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# OHIO LEGAL NEWS

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VOLUME IV.

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OCTOBER 17, 1896, TO OCTOBER 9, 1897.

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EDITED BY J. F. LANING.

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The publishers of the LEGAL NEWS publish annually three volumes, which contain the reported decisions of the courts of record of the state, under the title of Ohio Decisions. Advance sheets of these volumes for temporary use of subscribers are issued each week as supplements to the LEGAL NEWS, without additional charge to subscribers to the volumes.

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## THE FOREMOST OHIO LAW PAPER.

*The growth of this paper during 1896 has been so marked that we confidently assert that it now has a greater circulation than any other Ohio law paper. It also contains so much more legal matter that we are justified in claiming it to be the leading paper in its class.*

Judging from the brilliant effusions found in the Bull. of last week, its publisher has been turning the editorial department over to the office boy. We note the improvement.

Acting Attorney General Whitney, has decided that foreign made chromos, which are copies of copyrighted foreign paintings, are not prohibited from importation into this country under the copyright law.

The democrats of the third judicial circuit court district met at Lima last week to nominate a candidate for judge for the short term, General E. B. Finley, of Bucyrus, was nominated by acclamation.

Judge Buchwalter, of the Hamilton common pleas, held in the case of *Overheiser v. Mutual Life Ins. Co., of N. Y.*, that a divorced wife is entitled to the proceeds of a policy of insurance, she having been named as the beneficiary and divorced subsequent thereto.

In the case of *Echelmann v. Heil*, the judge said that a bill of exceptions allowed by a magistrate on the fourteenth day after trial was not a valid bill, the statute not permitting a magistrate to extend the time for presenting a bill beyond ten days.

Judge Badger, of the Franklin common pleas rendered a decision recently, which is without a parallel in any of the courts of our state. The case arose from the following statement of facts: In November, 1888, one William Sharp, married Mary E. Williams. One year later she sued for a divorce, but failed to make her case; subsequently in 1892 she again sued for divorce, and was this time successful and got a decree and was also awarded \$300 alimony, but at that time Sharp was insolvent. Two years later Mrs. Sharp married a man by the name of Perry; she died leaving her husband as sole heir, an administrator was appointed, and as Sharp's mother had died in the meantime leaving him an interest in her farm, the administrator sought to collect the \$300 alimony judgment. Sharp brought suit to set aside the alimony decree, as it would have to be paid to the husband of his dead wife. The attorney for the administrator demurred to this and the court sustained him in his demurrer, and Sharp will now be compelled to pay the amount and settle with the widower of his divorced wife.

G. N. Tuttle, of Painesville, was nominated last week Wednesday, by the democrats of that district for circuit judge.

Judge Somers, of the Franklin county judicial district, will fill Colonel C. H. Kibler's place on the circuit court bench when it sits at Newark, next Tuesday.

Our Law Bull. competitor complains of our reprint of old law publications that we have not added enough to them. We presume he has been making the opinions he will publish much more valuable by adding to the language of the court some of Jahn's unintelligible jargon.

Judge Route, of Atlanta, Ga., holds that a hypnotist is responsible for the acts of his subjects.

During the performance at a local theatre the subject of the hypnotist imagined he was a monkey, and grabbed a hat off a man in the audience and bit a piece out of it. The professor and his business manager refused to make good the cost of the hat, and the hypnotist was prosecuted. The charge was sustained by the court and the hypnotist was bound over.

The ambitious publisher of the Law Bull. gave us about three columns of free advertising last week, in which he told his subscribers some of the truths we have been saying about him recently. We presume that, from those who read his attempted denials and unintelligible explanation, we shall be able to get enough new subscribers to cut his remaining seven hundred and fifty down to five hundred.

Judge Maynard, of Washington C. H., judge of the Fayette common pleas, rendered an important decision last week in the case of the *City of Washington v. Gallagher*, the latter having been arrested for violating the ordinance requiring all screens to be removed from the doors and windows of saloons. The court sustained the opinion of the mayor that the anti-screen ordinance was constitutional. As a result of this decision, henceforth the saloon men of the city will be more careful in the observance of the law. Sometimes to get around the law they allow their windows to go unwashed so that the dust that accumulates thereon will obscure a view of the bar from the pavement. This is the first decision rendered on this point by so high a court.

The editor of the Bull. bragged last week that he drove the Ohio Law Journal out of the field, and was going to do the same to us. We remember of once reading a whine in his paper that he had to pay them \$16,000, to quit. Wonder if he expects to force us out in the same way.

A mandamus suit was brought in the supreme court, Monday of this week, for the purpose of testing the constitutionality of the Dana law which forbids the use of a candidate's name in more than one ticket, on the election ballot.

This suit comes from Cincinnati and concerns the "Lawyers' Judicial Ticket" in Hamilton county.

The democrats accepted the nominations as appearing on the Lawyer's Judicial ticket and put the same on their county ticket. The county board of election supervisors, acting under the Dana law, refused to put these names on both tickets, and this suit is brought to compel them to do so.

Judge Evans, of the Franklin common pleas, in a lengthy opinion, sustained the motions to dismiss the petition filed by Mrs. Miesse against Charles E. Miesse, on the ground that the defendant had not been served and the court had no jurisdiction. It appears that Miesse secured possession of his children and fled to Dakota, and that his abandoned wife then entered suit for alimony and enjoined Miesse from disposing of his property. Personal service could not be secured upon him, and under Judge Evans' ruling these suits fell to the ground. He held that the statutes did not authorize the seizing of the property of a non-resident husband to enforce the payment of alimony. This leaves Miesse free to do as he pleases with his property.

Don't any one be deceived by the idea that good reprint volumes of the Ohio Law periodicals are to be sold at two dollars each. Our competitor once announced that he was going to print a series at \$3.50 per volume. Evidently the bar knew of the errors in his previous books, and did not misjudge his inability to get out a desirable reprint, and they did not take to his offer. So he then came down to \$3.00. But he asked for 800 subscribers as a guarantee against loss. Still they did not come, so he came down to \$2.00, and still they won't come. If they do they are not liable to

get the books. He is evidently just putting up a big bluff to interfere as much as possible with the sale of our series. But it don't work. We have sold, within the past week, more copies of the two furnished volumes than ever in a week before. Our books are well made, free from errors, and as cheap as they can be sold without loss to publishers.

### BRIBERY CASES.

The circuit court reversed the decision of Judge Pugh in the case of *The State of Ohio v. Abbott*. As to the law of bribery which the court gave to the jury, and which was criticized somewhat at the time, the circuit court found no error. It also found no error in the admission of Price's testimony. The court, however, did find that there were two errors committed by the lower court. Price's testimony related to an independent offense alleged to have been committed by Abbott. The court instructed the jury that that evidence was to be considered as bearing on the question of intent, but because the court did not go further and say that it was not competent for the jury to consider it as tending to prove the crime for which the defendant was on trial, the circuit court decided that it erred, although such a charge was not requested by the defendant. The jury returned to the room on two occasions and asked the court to read testimony. The second time they asked the court to read testimony that corroborated Black's testimony on a certain point. The court replied by saying that it was not competent for the court to say what evidence corroborated Black's, but could only say what evidence tended to corroborate it, and thereupon proceeded to read some testimony. The circuit court held that the testimony read was not corroborating in its character, and therefore it was error to read it.

Case remanded back for new trial.

### FRAUD—SALE OF LAND.

[Franklin Common Pleas, January Term, 1896.]

#### SPENCER V. KING.

- (1) Fraud in the sale of property defined.
- (2) The decision of the supreme court of Illinois determining the validity of a title to land situated in that state, is binding upon the court and jury in this case.
- (3) The opinion as to the value of land expressed by the seller to induce the purchaser

to buy is not a fraud, if it was *only an opinion, and was honestly* given, although untrue.

- (4) The law does not exact any greater degree of honesty and good faith from a minister of the gospel who sells property than it does from a layman.

#### CHARGE TO JURY, DELIVERED BY JUDGE PUGH.

*Gentlemen of the Jury:* The plaintiff complains that she has sustained damages by reason of deceit or fraud practiced upon her by the defendant.

Deceit, or fraud, in business transactions consists in fraudulent representations or contrivances by which one person deceived another who has a right to rely upon such representations, or has no means of detecting such fraud.

It is the law that fraud vitiates every contract. There is no exception to this rule. When fraud is proved to have promoted the making of a contract, it is void, and cannot be enforced. Fraud taints every transaction which is the result of it. But fraudulent representations in the sale of property will not, *in themselves*, always constitute deceit which will be the subject of an action for damages.

In cases like this where parties deal with each other on a footing of equality, there must be some existing circumstances, or some means used, calculated to prevent the detection of falsehood or fraud, and impose upon a purchaser of *ordinary intelligence, prudence and circumspection*. If a purchaser has full opportunity of examining the property, and can easily and readily ascertain its quality and value by inspection, and he neglects to do so, then any injury which he may sustain by such negligence is the result of his own folly, and he can have no relief at law; unless the representation was of such a character as to mislead a prudent person or put him off his guard.

The law wisely and justly presumes, in such a case, that a purchaser will take care of his own interests, and that when he distrusts himself, his own judgment and shrewdness, he will protect himself from imposition. When the purchaser has a full opportunity of inspecting the property and fails to do so, and the representation was not such as should have misled him, he has no right to complain, if the property sold does not measure up to the representation of the seller. It is well known that, in the course of trade, sellers will speak in terms of high commendation of the property which they offer for sale. Such "dealing talk" is not deemed, in law, as fraudulent, unless accompanied with some artifice calculated to deceive the purchaser and throw him off his guard, or some concealment of intrinsic defects not easily discoverable, by reasonable diligence and care.

The plaintiff and her brother exchanged some real estate situated in this city with the defendant for notes owned by him. Part of the real estate consisted of a house and lot, which was wholly owned by the plaintiff, or almost so. I believe the testimony shows that the brother had a small interest in it. The value of the house and lot was somewhere between five thousand and six thousand dollars. The notes aggregated \$7,500. A note for \$1,000 was also

given to the defendant, first by the brother; but afterwards it was signed by the plaintiff.

This transaction was, in law, a sale of the notes by the defendant to the plaintiff. These notes were secured by a mortgage on three thousand acres of land situated in the state of Illinois. They have been described by the testimony.

The immediate ground work of the plaintiff's action is the claim and charge that the defendant falsely and fraudulently represented to her and to her agent, her brother, that the notes were well secured on land which was worth \$15 per acre. It is further charged that the land was not worth that amount; that it was not worth enough to make sufficient security for the notes, and that the title to the land was so involved in dispute as to make the land practically worthless.

It is not controverted that most of the negotiation which led to these sales and exchange of property were chiefly conducted, on the part of the plaintiff, by her brother as her agent. She only claims that she had one conversation with the defendant. In law all that her agent, Leroy Spencer, did and said in the course of his agency, while he was acting as her agent, and within the scope of his agency, are just as binding upon her as if she had been the authoress of those acts and declarations.

Any notice and knowledge which he possessed was her notice and knowledge; any imprudence or mistake or neglect which he committed, was, in the eye of the law, her imprudence, mistake and negligence.

You have observed from my statement that the defendant is charged with having made two false representations. First, that the notes were well secured by a mortgage on land; second, that the land was worth \$15 per acre.

Putting aside for the present any rule of law that is specially applicable to those complaints, or either of them, you are instructed, that to entitle the plaintiff to recover, she must, by a preponderance of the evidence, have proved: (1) That the representations, or one of them, were made; (2) that both or one of them, were false; (3) that the defendant knew, at the time they were made, that they were false; (4) that she and her agent were then ignorant of their falsity; (5) that she relied upon those representations, or one of them, in making the purchase of the notes and in selling her property; (6) that she was justified in relying upon them; and (7) that she was pecuniarily injured by her conduct which was induced by those representations, or one of them. If all of these propositions of fact have not been proved by a preponderance of the evidence, the defendant is entitled to your verdict.

If the defendant made the representation that the notes were well secured on land, that meant that the land would sell for enough to pay the notes, if the mortgage should have to be foreclosed. That was what the plaintiff was entitled to, if such a representation was made by the defendant. It is claimed that the notes were not well secured, because the title to the land was not good.

It was proved, by evidence, that the land was, at one time, owned by Wayne county, Ill.

It was conveyed by a mortgage and trust deed to one Seymour, which were executed to secure certain bonds, called railroad bonds. The mortgage was foreclosed by a decree of the circuit court of the United States for the southern district of Illinois; the land was sold, under that decree, and purchased by the bondholders. The evidence does not disclose that the apparent title of those purchasers has ever been annulled by any court.

After that suit for foreclosure was brought, Wayne county sold the land to the Illinois South Eastern R. R. Co. It was this title which was held by G. D. Martin when he executed the mortgage that secured these notes sold to the plaintiff.

But the supreme court of Illinois has decided that the decree of foreclosure of the United States court was a nullity as to those who purchased the land of Wayne county, and who were not parties to the foreclosure suit, although they purchased after the suit was brought, and even after the foreclosure.

That court also decided that Wayne county was not legally authorized to mortgage the land to Seymour, because the condition upon which the county might aid in the construction of the railroad for whose benefit the mortgage and trust deed were executed, did not then exist; and therefore they were void.

This decision was introduced in evidence. It discloses what the law of Illinois was, and is, and it demonstrates as matter of law, that there is no merit in the title which is claimed to be adverse to the title which was conveyed to the defendant by the mortgage to secure the notes sold to the plaintiff. By this decision both the court and the jury in this case must be controlled.

Still the question is, were the notes well secured by the mortgage on the land?

It is claimed that, in spite of the fact that the law of Illinois makes the King title paramount to the other opposing title, there was and is a cloud on it which destroys the sufficiency of the mortgage as a security for the notes.

If the adverse claim based upon the foreclosure which was caused by the United States Court decree, injuriously affected the title covered by the mortgage to the defendant; if it could be vexatiously used against that title, it constituted a cloud upon that title. A title of which a purchaser cannot acquire possession, except by litigation and judicial decision, or one which he must defend, or which would expose him to litigation, is a doubtful, and unmarketable title.

If the evidence shows that the title which was conveyed by the mortgage in question was such a title, as I have described, then it is competent for you to consider it, in determining whether the mortgage security for the notes in question was destroyed or impaired; if it does not show that fact, there is no merit in the claim touching the disputed title.

Le Roy Spencer, in his deposition, testified that the defendant told him "at the time of the trading that there was a pretended claim to the land by other parties, but that they could not sustain the claim, for the reason that

they had held the land in the family for over thirty years, had paid the taxes, and no other claim had been set up against it coming to him," and that he also told him "how the other claim had come, that the government had given the land to the state and the state had given it to the county, and the counties had given the land to some railroad companies on a contract, but the contract had never been filled, and title failed on that account. Then the county contracted with another railroad company, and Mr. King got his title, or his father-in-law got his title, from the last company.

This evidence must have the same influence upon your minds in determining this question, as if the evidence proved that the communication had been made by the defendant to the plaintiff, and was submitted by her; because he was her agent,

I submit the question to you, whether this admission of Spencer's does not show that he had the means of knowing all the truth about the title to the lands. The law requires persons "in their dealings with each other, to exercise proper vigilance, and apply their attention to those particulars which may be supposed to be within reach of their observation and judgment, and not to close their eyes to means of information which are accessible to them."

If Spencer had full knowledge of the condition of the title to the land, before the exchange was made, or if it was within his reach owing to the information given to him by the defendant, that was the same as if the plaintiff possessed it, and if you so conclude, you will not be authorized to return a verdict for the plaintiff, so far as her cause is founded upon the first alleged misrepresentation, namely, that the notes were well secured by a mortgage on the land.

Now as to the other alleged misrepresentation, that the land was worth \$15 per acre.

The plaintiff, as well as Le Roy Spencer, testified in regard to this matter. The opinion which a seller of property expresses concerning its amount, value and quality is frequently asked for, and given at sales, and is never a ground for a law suit, when it proves to be untrue, *if it was only an opinion and was honestly given.*

But if the statement of the value was more than an opinion; if it was an affirmation of a specific material fact; if it was deliberately made by the seller who had superior knowledge in regard to it, and if it was acted upon by the buyer; and if it was known to the seller to be false, it may be deemed fraudulent and a sufficient basis for an action.

This is the rule which applies to this branch of the case here.

The defendant was about to sell, not land, but a mortgage on it, or rather notes secured by it; the land being situated in another state, not accessible to the observation and judgment of either the plaintiff or agent. If the defendant had knowledge of its value superior to their knowledge, or superior knowledge without regard to theirs; if he deliberately represented to both, or one of them, that it

was worth \$15 per acre, and that was something more than the general praise, or puffing, which sellers are liable to indulge in; if he knew it was false; and, if the plaintiff, or her agent, acted in reliance upon it, in making the purchase of the notes, and in selling her property, it is competent for you to infer that it was a fraudulent representation, *unless you further conclude that it was not material.* What I mean by this is, that, if the evidence discloses that the land, although not worth \$15 per acre, was worth enough to pay the notes, then, the plaintiff cannot complain. She is not entitled to recover damages on this ground.

But, if you find that the representations as to the value of the land, or as to the notes being well secured, were only opinions, only trade talk, then the plaintiff cannot recover any damages, notwithstanding the opinions were untrue.

The law does not assist the purchaser who pins his or her faith to the exaggerations of the value of property made by the seller of it. And you should reach the same conclusion, if you are convinced by the evidence that the defendant believed the representations to be true, and he had good reasons for so believing, although, in fact, they were not true.

This is not a case where a fiduciary relation existed, and where confidence, expressed or implied, growing out of or connected with the transaction in question, was reposed by the plaintiff in the defendant. The evidence does not prove such a case. The only relation between them was that of vendor and vendee, the parties dealing with each other at arm's length.

In determining the questions submitted to you, you will consider not only what was said and done by the plaintiff, her agent, the defendant and his agents, Rickard and Gaskill, but also the fact that the notes were indorsed without recourse by him, and the fact that some of the deeds in the chain of both titles were quit claims and not general warranty deeds, as far as they bear upon these questions, and all the other facts and circumstances proved, bearing upon the questions.

The indorsement of the notes without recourse released the defendant from all personal liability upon the notes, but that was all.

If the notes are invalid from want of consideration as a result of the fraud charged in this case; and if this fraud has been proved, his qualified indorsement of the notes does not shield him from a recovery for damages on this ground.

The evidence of the defendant tends to show that Leroy Spencer, as the agent of the plaintiff, after the sale of the notes, visited the land, and made some inspection of it, and on his return expressed his own and his sister's satisfaction with the land.

There is evidence on the plaintiff's side however, which tends to controvert that evidence. That evidence (the evidence for defendant) was only admitted as tending to prove an admission by the plaintiff's agent

that she was not defrauded as she claims, in this action, and for no other purpose.

It cannot be considered as foreclosing her right to maintain this action; for the evidence does not prove that the defendant relied upon the alleged admission of Spencer as the inspiration for any action of his own. I admonish you that there is no issue here about the want of business capacity or mental weakness of either the plaintiff or her agent.

There was some evidence cropped out on these subjects, but not being made part of the cause of action, they cannot be ground for recovery.

Should you reach the conclusion that the plaintiff is entitled to recover, the measure of her damages would be the face value of the notes, and interest to date added, less the value of the 1500 acres of land which was conveyed to her by Martin, and less the thousand dollar note, and the interest, unpaid.

In estimating the value of that land, you have a right to consider the fact, if it has been proved, that the defendant has an attachment lien on it to secure the payment of the one thousand dollar unpaid note.

In considering and deciding this case, you must not permit the mere facts that the plaintiff is a woman, and the defendant is a minister of the gospel to influence your judgment.

These are circumstances that may have some bearing, but they are not substitutes for evidence that may be wanting to prove material facts, if you find that is the posture of the evidence.

The law does not exact any more from a minister of the gospel than it does from a layman, when he makes a sale. You may have a conviction that a minister, in such a transaction, should act upon higher principles than a layman, but the law does not demand it, and therefore you have no right to do it.

This may be a melancholy fact, but it is not within the province of the court or jury to alter the law.

The performance of the moral duties of charity, gratitude, generosity, magnanimity, courtesy, mercy and kindness is not enforced against either a minister or a layman. Natural justice enjoins their performance, but the law refuses to do it for obvious reasons.

It is your duty to do what is legally just by both plaintiff and defendant.

The law and evidence must guide you in doing that, nothing else. Here you must know neither friends nor enemies. Here you must be actuated by reason only, in its most cool, calculating, deliberate and unsympathetic spirit.

I invoke in you the spirit so beautifully, though figuratively, exemplified in the goddess of justice, who, blind-folded, weighs in the scale of justice every human action, and fearlessly determines the right without passion or prejudice, and uninfluenced by the wealth, position, or the rank of the parties.

## SUPREME COURT OF OHIO.

Official Record of Proceedings.

TUESDAY, October 13, 1896.

### General Docket.

4219. Benjamin F. Johnson et al. v. The Village of Ashland. Error to the circuit court of Ashland county. Judgment affirmed.

4272. Charles W. Dennison v. The Hamilton Coal Co. Error to the circuit court of Trumbull county. Dismissed by plaintiff in error.

4274. Allen Hegler, Receiver v. The People's and Drivers' Bank. Error to the circuit court of Fayette county. Judgment affirmed. Williams, C. J., not sitting.

4278. Alexander Gibb v. Elmer E. Townsend, Receiver, et al. Error to the circuit court of Huron county. Judgment affirmed.

4290. Ottilie Baier v. J. J. Stoll et al. Error to the circuit court of Wyandot county. Judgment affirmed on the authority of Neuman v. Becker, 51 Ohio St., 25 W. L. B., 147.

4296. Jane Mulroony v. Alfred Clum, Administrator et al. Error to the circuit court of Cuyahoga county. Judgment affirmed.

4310. The Village of Barnesville v. Charles Rosser. Error to the circuit court of Belmont county. Judgment affirmed.

4317. Charles Amelong v. Philip Keil. Error to the circuit court of Belmont county. Judgment of the circuit court reversed and that of the common pleas affirmed.

4336. Samuel L. Mannix et al. v. David M. Eikenberry, Executor. Error to the circuit court of Preble county. Judgment affirmed.

4339. James B. Gormley, Assignee, v. Delos L. Thomas. Error to the circuit court of Seneca county. Judgment affirmed on the authority of Armstrong v. Warner, 49 Ohio St., 376.

4937. Pearl Harman v. The State of Ohio. Error to the circuit court of Jackson county. Judgment affirmed.

### Motion Docket.

2736. John W. Blair v. The Pittsburg and Lake Erie R. R. Co. Motion by plaintiff to advance cause No. 5205, on the general docket. Motion allowed.

2737. John Shook et al. v. Chester Bedell. Motion for leave to file a petition in error to the circuit court of Trumbull county. Motion overruled, leave to file not being necessary.

2738. State of Ohio v. J. J. Diebold. Motion for leave to file a bill of exceptions to the magistrate's court of Hamilton county. Motion overruled, there being no authority for filing bill of exceptions in such cases.

2739. Ella Frederick, Administratrix, v. The City of Columbus. Motion by plaintiff to consolidate causes Nos. 5102 and 5103, and to extend time to file printed record in cause No. 5103, on the general docket. Motion allowed.

2740. W. W. Dunnavant et al. v. Clara T. Howlett. Motion by plaintiffs for diminution of record in cause No. 4354, on the general docket. Motion overruled, but clerk of the circuit court is directed to certify to the court a complete transcript of the record of the circuit court.

2741. John W. Minor v. Minerva E. McCloy, Administratrix. Motion by plaintiff for extension of time to file printed record in cause No. 5105, on the general docket. Motion sustained.

2742. Same parties, same motion. Motion overruled.

2743. State of Ohio v. W. D. Guilbert, Auditor. Motion by plaintiff to advance cause No. 5230, on the general docket. Motion allowed and cause advanced.

2744. The L. S. & M. S. Ry. Co. v. James J. Kirby, Administrator. Motion by plaintiff to dispense with printing exhibits B., C. and E. in cause No. 5116, on the general docket. Motion allowed.

2745. George S. Walton v. Samuel Grove, Sr., et al. Motion by plaintiff to reinstate cause No. 5098, on the general docket. Motion allowed by consent and time for filing printed record extended to October 12, 1896.

#### New Cases.

New cases filed in the Supreme Court since Sept 30, 1896:

5251. John Woolley v. Eleanor v. Arnold et al. Error to the circuit court of Hamilton county. Cobb & Howard, for plaintiff. Marion & Oldham, Cobb & Howard, for defendants.

5252. The State of Ohio ex rel. v. Upton K. Guthery, Aud. Mandamus. J. K. Richards, J. A. Wolford, E. W. Scofield, for plaintiff.

5253. William Clerkin v. Fred W. Waltz. Error to the circuit court of Summit county. Walsh & Sawyer, for plaintiff. A. E. Kling, for defendant.

5254. Samuel Gynn et al. v. Dudley L. Oviatt et al. Error to the circuit court of Cuyahoga county. Benjamin C. Starr, for plaintiff.

5255. Philip Keil v. Benjamin Thomas. Error to the circuit court of Allen county. Brotherton & Brotherton, for plaintiff. A. W. Smith, J. G. Lawson, for defendant.

5256. H. E. Schmidt v. F. C. Trebein. Error to the circuit court of Greene county. Chas H. Kyle, for plaintiff. Little & Spencer, for defendant.

New cases filed in the supreme court since October 7, 1896:

5259. Thompson & Richards, a partnership, v. Elizabeth Beery. Error to the circuit court of Allen county. Cable & Parmenter, Stallings & Stallings, for plaintiffs. Motler & Mackenzie, for defendant.

5260. H. T. Day et al. v. William J. Berry. Error to the circuit court of Belmont county. D. Danford, Rees & Hollingsworth for plaintiffs. Tallman & Armstrong, for defendant.

5261. The Superior Coal Co. v. America Hollingsworth, Admr. Error to the circuit court of Jackson county. Jess, Laird, James M. Tripp, for plaintiff. Elmer C. Powell, for defendant.

5262. The J. C. McNeal Co. v. The Brownell & Co. Error to the circuit court of Summit county. Oviatt, Allen & Cobbs, for plaintiff. Graut & Sirber, for defendant.

5263. Hiram McKnight v. E. G. Coffin. Error to the circuit court of Franklin county.

Frank S. Monnett, attorney general, for defendant.

5264. The American Lamp & Brass Co. v. Frank M. Baldwin. Error to the circuit court of Lucas county. W. H. A. Read, for plaintiff. A. Farquharson, for defendant.

5265. Jacob Karch v. The P. C. G. & St. L. Ry. Co. Error to the circuit court of Greene county. T. E. Scrogg, for plaintiff. Chas. Darlington, for defendant.

5266. Henry M. Purdy v. William J. Marshall. Error to the circuit court of Brown county. Young & Barnes, White & Campbell, for plaintiff. Loudon & Waters, for defendant.

5267. James B. Pennington v. A. Brown McClelland. Error to the circuit court of Seneca county. Noble, Keppel & Noble, for plaintiff. Brewer & Brewer, for defendant.

5268. State of Ohio ex rel., Warner M. Bateman et al. v. Benjamin F. Ehrman et al. Mandamus. E. W. Kittridge, Thomas McDougal, L. G. Black, William Warrington, Lawrence Maxwell, Jr., G. Wald, H. D. Peck and Phillip Rottinger, for plaintiffs. August N. Bock, F. S. Spiegel and F. Hertenstein, for defendants.

5269. Frederika E. Kihlken v. Ferdinand Kihlken et al. Error to the circuit court of Ottawa county. C. J. York, for plaintiff. E. G. Love, for defendants.

5270. F. J. Picard et al. v. J. M. Hughey, as receiver, etc., et al. Error to the circuit court of Highland county. Huggins & Horst, for defendants.

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*The growth of this paper during 1896 has been so marked that we confidently assert that it now has a greater circulation than any other Ohio law paper. It also contains so much more legal matter that we are justified in claiming it to be the leading paper in its class.*

The Cleveland City Hall case, in which the common pleas court, at a previous term temporarily enjoined the city from building a city hall on the Public Square, was again continued to the next term of court, at the request of the plaintiff's attorney.

The cases from Kentucky, Indiana, and Ohio, involving the validity of the laws of these states taxing the telegraph and express companies, were re-assigned by the United States supreme court Monday of this week for argument on the first Monday of December. There are sixteen of these cases altogether.

State Auditor Guilbert, decided a question last week which had been submitted to him some time ago, as to whether cigarettes wrapped in tobacco instead of rice paper are still cigarettes within the state law governing the same. He decided that they are cigarettes and must be so regarded by all laws affecting cigarettes.

The case of *Charles J. Weaver v The C. S. & H. Ry Co*, brought on error to the circuit court of Perry county, was argued before the supreme court last Friday. The question at issue is as to whether the bill of exceptions in that case was signed by the common pleas judge within the sixty-day limit.

Another case argued the same day was that of the *City of Cincinnati v. A. J. Pruden*, who sued for damages on account of the city establishing a market upon a certain street.

The October number of the *Western Reserve Law Journal*, has been received, and contains a very interesting article on "The Trial of the Assassins of Abraham Lincoln," by Hon R. C. Parsons, of Cleveland, also the address of Hon H. C. White, which was delivered at the laying of the corner stone of the new law school building last June. In the editorial department we find a very interesting and pithy editorial entitled "The Duty of the Voter." The department of Recent Cases and Digest of Ohio Cases is a valuable feature of the *Journal*, especially the latter, which digests every Ohio case reported.

The *Journal* deserves the liberal patronage of every member of the Ohio Bar, and can be secured for the small sum of one dollar per year.

Chief Justice William A. Richardson, of the United States court of claims, died Monday morning of this week; he was formerly secretary of the treasury.

Judge Richardson was born in Massachusetts in 1812, was a graduate of Harvard and subsequently became judge advocate of Massachusetts. In 1873 he became secretary of the treasury and resigned that position in 1874 to accept a seat on the bench of the United States court of claims, tendered him by President Grant. In 1875 he became chief justice of that court which position he held until his death.

Judge Lurton, of the United States court of appeals, at Cincinnati, in the suit of the *Louisville Trust Co., trustee, v. City of Cincinnati et al.*, which was brought to determine the effect of the decision of our state supreme court, which affirmed a decision of the Cincinnati superior court, in which it was held that the franchise of the Cincinnati Inclined Plane Railway Co., Main street electric had lapsed.

Judge Lurton's decision reverses the judgment below of Judge Sage, and sends the case back for the holdings to be carried into effect.

It is doubtful whether the decree under the present decision could be taken advantage of against the previous and conflicting decree of our state supreme court, but, the road being in the hands of a receiver, appointed by a U. S. court, it is impossible that any steps can be taken under our state supreme courts decree.

Judge Sage, of the United States court at Cincinnati, announced a decision on Wednesday of last week, which will become a precedent of great interest to bankers and business men in general. The case arose out of the borrowing of \$300,000 by E. L. Harper, of the Fidelity National Bank, from the Chemical National Bank of New York City, in 1887. Harper borrowed the money on his own responsibility, for the purpose of placing it in the Fidelity National Bank, but without first consulting the bank trustees. When the bank failed, the Chemical Bank entered suit against receiver Armstrong of the Fidelity Bank, to recover the \$300,000, with interest. The receiver fought the suit because the trustees had not authorized the loan. The complaint alleged that they were doing business with an officer of the bank and made the loan in good faith and had no means of knowing his misdoings.

Judge Sage decreed for the complainants and gave judgment for the amount with interest.

Judge Hollister, of the Hamilton common pleas, in a decision recently filed in the case of *White, administrator v. Lapp*, and which we will publish in full in a subsequent issue, contains an interesting discussion as to whether the six months in the statute providing for proceedings in error, means six lunar months or six calendar months.

The holding is that the English common law rule is not in accordance with the habits, customs and common understanding of our people, and that the word *month*, as used in our statutes, means a calendar month, as in ordinary parlance.

#### NEWLY MADE LAWYERS.

Out of seventy-six candidates seeking admission to the Ohio State Bar, fifty-two successfully passed the quarterly examinations held at Columbus the thirteenth of this month, and were granted certificates of admission. The successful ones are as follows:

E. F. Bagley, Zanesville; Benjamin Baldwin, Dennison; Harvey W. Clark, Cleveland; Lee S. Day, Elyria; Harry L. Bowers, Mansfield; Edwin C. Ely, Batavia; Horatio J. Forgy, Springfield; Harry E. King, Newton Falls; D. B. Kumler, Baltimore; Joseph W. Lane, Toledo; Jacob Line, Findlay; George S. Marty, Cleveland; George S. Marshall, Columbus; James H. McGiffert, Ashtabula; W. D. McTighe, Cleveland; Orra E. Monnett, Bucyrus; A. Alvin North, Greenville; C. H. Rauch, Toledo; G. W. Reed, McConnellsville; Otho C. Snider, Cleveland; Van A. Snider, Baltimore; Clarence Edwin Shockey, Columbus; Will P. Stephenson, Manchester; Clarence P. Taylor, Findlay; B. F. Welty, Lima; Fred B. Willard, Toledo; Jesse Huber, Lima; Charles S. Malone, Ottawa; Albert A. Slaybaugh, Leipsic; Robert W. Way, Wilmington; C. L. Smith, Wapakoneta; Justin A. Moore, Quaker City; Clark B. Carr, Fremont; Wilber T. Spriggs, Paulding; Roy G. Fitzgerald, Dayton; L. Howard Jones, Findlay; Clyde H. Judkins, Flushing; E. C. Stearns, Dayton; W. S. McConnaughey, Dayton; John R. Stiger, Bucyrus; Tage P. Sylvan, Upper Sandusky; E. A. Tinker, Chillicothe; Guy Underwood, London; K. T. Webber, Columbus; William A. Wilcox, Grove Hill; Harvey C. Wine, Zanesville; Nevin O. Winter, Bucyrus; C. H. Woodmansee, Felicity; Samuel W. Sprague, Batavia; Louis F. Walther, Georgetown; J. Guy O'Donnell, Covington; B. W. Johnson, Elyria.

An inhuman husband, who, when brought before humane officer Poole, of Cleveland, on a charge of beating his wife, replied by way of defense, as follows:

"The bible says man was made before woman, and she must obey him. If she doesn't he have a right to make her."

"Well" replied Poole, "the law of Ohio says that if you strike your wife I can have you arrested, and I'll do it, too."

The husband, abashed, took his wife home promising to treat her as a man should treat a woman. Watchful care is being kept over the domestic happiness of the family.

#### DANA LAW.

The supreme court last Friday handed down a decision sustaining the Dana law which was passed last winter and which prohibited the printing of a name more than once on the Australian ballot. The decision was on the mandamus case brought by the *State ex rel. Bateman v. Ehrman et al.*, which was brought by members of the Cincinnati bar for the purpose of testing the law which prevented the printing of the names of candidates for judgeships in Hamilton county, both on the bar ticket and the Democratic ticket, the democracy having indorsed the bar candidates. The decision sustained the demurrer and dismissed the petition. The case will be reported in full in a subsequent issue of the *News*.

#### U. S. SUPREME COURT.

After a four months' recess the United States supreme court convened Monday, the twelfth inst., for the October term. All the justices except Justice Shiras, who is expected daily, are now in the city, so that there will probably be a full bench at the beginning of the term.

The court docket now contains 615 cases, against 751 at the beginning of last year's Oct. term, and of these 28 have already been argued and submitted and are before the court for decision. It would, however, be contrary to precedent if there should be any decisions on the first Monday of the sitting. When the president is in the city the court transacts no business on the first day of the term beyond making a formal call at the white house. He is absent now, as he was last October, and it is presumed that as on that occasion the court will admit attorneys to the bar and hear such motions as may have been noted for that day.

The call of the regular docket will begin on Tuesday and continue during the remainder of the week. This call will then be suspended

in order to hear more urgent cases, of which there are 54, which have been especially assigned for the second week of the term. Included in this special list are the case of *The United States v. The Oregon and California Railroad Co.*, known as "The Quadrant case," and involving the company's land grant; ten cases from Ohio and four from Indiana to enjoin the assessment and collection of taxes against express and telegraph companies; four from South Carolina involving the constitutionality of certain parts of the dispensary law; *The United States v. The Bell Telephone Co.*, which is a suit to cancel the Berliner patents; *The United States v. The Union Pacific, The Winona and St. Paul and The Sioux City and St. Paul Railroad Co's.*, to restore to the United States certain lands alleged to have been illegally patented, and also several murder and other cases of criminal nature.

It is presumed that on Monday, the 19th, some of the cases which have already been submitted will be decided. There is a special interest in the two irrigation cases from California, involving the constitutionality of the Wright irrigation law. Other cases of general importance which have reached this stage of progress are the freight elevator case from Nebraska, the case involving the title to the site of the city of Santa Fe, N. M., and the Laclede Gas company case from St. Louis.

#### COTELL'S CASE.

The circuit court of Summit county, overruled the motion for a new trial in the case of Ronulus Cotell, sentenced to hang Nov. 6, for the murder of the Stone family.

Judge Hale rendered the decision, saying that the exceptions noted in the case were numerous, and that only a few of them would meet discussion.

At the commencement of the trial in the lower court, plaintiff in error made a motion to require the defendant in error to elect on which count the case would be tried, and the court ruled that it was not necessary. In this the court did not err in any of its ruling.

At the trial plaintiff in error objected to the testimony of James Doran, as to the confession made by Cotell, on the ground that it was not voluntary and therefore inadmissible. The competency of this confession depended altogether on whether it was voluntary or involuntary, and in order to determine its character the trial court heard testimony regarding it, in the absence of the jury, and from the testimony given arrived at the conclusion that it was voluntarily given and admitted it as competent. The circuit court does not reverse this decision and believes that the trial court was right.

Judge Hale said it was the opinion of the court that the testimony of one Sackett, as to

the appearance of the room on the morning following the crime, and the evidence which showed the feelings of Cotell towards Flora Stone, was competent. The court also finds the testimony of Flora Stone in regard to recognizing the voice of the murderer as being competent.

The court said that there was no prejudice whatever in the trial court's charge to the jury, and that the charge of the court on the question of insanity was not erroneous. In closing, the court said "On the most careful review of the entire record in this case we have reached the conclusion that the rights of the plaintiff in error were fully protected and that there is no error by which a new trial should be granted. Therefore, the verdict of the common pleas court is affirmed."

Cotell's attorneys were surprised at the refusal of the court to grant a new trial and will file a petition in error in the supreme court so that a hearing may be had by October 22.

#### POETRY IN COURT.

A terrible disease seems just at present to be epidemic among the members of the Bar. A "poetic mania" has seized them. The malady has appeared in a malignant form in Kansas, two prominent lawyers being the victims. We are indebted to the Kansas City "Star" for the following account of its ravages:

The damage suit of J. J. Smith against Kansas City, Kans., which was tried in the court of common pleas in Kansas City, Kans., some time ago, is the cause of considerable merriment among the members of the Wyandotte County Bar. Mr. Smith was represented by Colonel L. C. True, and the city by Counselor Reese. It is the first case on record in that court in which the argument was made in poetry, the plaintiff getting a verdict apparently on the strength of the poetical appeal to the jury:

When the evidence was all in Colonel True delivered his argument. It was a short statement of the case and included this novel address to the jury:

Is there no place on the face of the earth  
Where charity dwelleth, where virtue has birth?  
Where bosoms in kindness and mercy will  
heave,  
And the poor and the wretched shall ask and  
receive?

Is there no place on earth where a knock from  
the poor

Will bring a kind angel to open the door?  
Ah! search the wide world wherever you can,  
There is no open door for the moneyless man.  
Go look in your church of the cloud reaching  
spire,

Which gave back to the sun his same look of  
fire,

Where the arches and columns are gorgeous  
within,

And the walls seem as pure as the soul without  
sin;

Go down the long aisle—see the rich and the  
great,

In the pomp and the pride of their worldly  
estate;

Walk down in your patches, and find if you  
can

Who opens a pew for a moneyless man.

Go look in the banks, where Mammon has  
told

His hundreds and thousands of silver and gold;  
Where, safe from the hands of the starving and  
poor,

Lies pile upon pile of the glittering ore;

Walk up to the counter—Ah! there you may  
stay,

Till your limbs have grown old and your hair  
turns gray,

And you'll find at the bank not one of the clan  
With money to lend to a moneyless man.

The jury in the above case returned a verdict for \$1,200 in favor of Mr. True's "Moneyless Man" in the shortest kind of order.

On the next motion day in the common pleas court, City Counselor Reese argued a motion for a new trial in another case. He began this way: "Colonel True, in his argument in the Smith case a few days ago, quoted from the case of the 'Moneyless Man,' reported in the Boys' and Girls' Recitation Book, price five cents.

"The unfair impression that the quotation made on the jury, the court, and also on myself was so apparent, that it left a lasting impression on me, and in a dream on the same night I repeated the above stanzas to an intelligent little terrier dog. When the canine said—for dogs will talk in a dream—"If that poetry is worth \$1,200, I'll give you some that is worth \$10,000," I patted the dog on the head and said 'Go ahead'. The dog raised himself on his hind feet, put my best spectacles on his nose and said—

"Gentlemen of the jury, attend, if you can,  
To the sad tale of woe of the moneyless man;  
He stands here before you, in want, as you see;  
He pleads not his merits; he pleads poverty;  
He can't go to church, his patches preclude;  
He can't go to the bank to get a note there re-  
newed;

His only last chance for wealth is the town;

Take pity on me and make it come down;

Gentlemen of the jury, have pity, pray do;

If my story be false, my counsel is True;

Look not on my failings, pass over my sin;

Look, look, I beseech you, just look at my shin—  
Poor shin, badly skinned on the sidewalk down  
there,

Please give me a plaster of dollars, and spare

Not the city. It's big; but pray help, if you  
can,

My noble good lawyers, and the moneyless man.

"The little dog then lay on his back, with his four feet in the air, and winking his other eye, said: 'That may not be poetry, but you must admit that is good dog-erel.' 'Well, Joe,' said I, 'there is not much poetry in it, but there is lots of truth,' and then—well, I woke up."

Mr. Reese's effort did not meet with such success as Mr. True, at least it did not convince Judge Anderson, and the motion for a new trial was overruled. An appeal will be taken to the supreme court. Mr. Reese's poem will accompany the transcript, as it is a part of the record in the case—*The Green Bag*.

### MARKING BALLOTS.

It has been decided by the secretary of state, who is supervisor of elections, that judges and clerks must obey that section of the law enacted last winter, which provides as follows:

"Any elector who declares to the presiding judge of election that he is unable to mark his ballot by reason of blindness, paralysis, extreme old age, or other physical infirmity and such physical infirmity is apparent to the judges to be sufficient to incapacitate the voter from marking his ballot properly, may, upon request, receive the assistance in the marking thereof of two of the judges of election, belonging to different political parties, and they shall thereafter give no information in regard to the matter. But such assistance shall not be rendered for any other cause which the voter may specify, and the presiding judge may require such declaration of disability to be made by the elector under oath before him."

In an elaborate opinion of Corporation counsel Phillips, of Cleveland, which was published in a recent issue of the NEWS, said in his opinion that the law was unconstitutional in that it would deprive some voters of their franchise right.

It will also be seen that the law practically calls for an educational qualification, and the question is at once raised, is the act constitutional, and until the act is declared to be unconstitutional or is repealed and thus removed from our statute books, it will be the sworn duty of the clerks and judges of election to see that it is enforced.

Following is a list of interviews with prominent members of the Cleveland Bar, which appeared in the *Cleveland Leader* recently, as to whether the enforcement of this law might not result in the disfranchisement of many citizens:

Hon. G. H. Foster—It is a constitutional question to which I have not given any considerable attention, but I should say that without reference to whether there ought to be a

law placing an educational qualification upon electors, there is no such law. According to the Constitution of Ohio, any law-abiding man over twenty-one years of age who shall have resided in the State a year, may vote in his election district, provided he be a citizen of the United States. According to that, I should think that unless the elector is by law given the opportunity to see and examine a copy of the ticket, say from one posted outside the booth. There ought to be no restriction upon the ballot being explained to him within the booth. I do not now remember whether the law provides for posting a copy of the ticket outside the booth or not. Considering the way the ballots are made up, I should think it would be difficult even for men of some intelligence to grasp at once just how to handle the ticket to vote as they desire.

J. G. White, Esq.—I am not quite ready to give an elaborate interview on the subject, but I have some decided opinions upon it which I will give you. The Constitution gives to every man three distinct rights. These are the rights of safe possession of property, safety of person from violence, and the right of franchise. The last named, affording as it does a right to participate in the government of the country, is fully as important as are the two first. No educational qualifications are required, and I should think it unsafe for any officials of elections to place obstacles in the way of any citizen's exercising the right of ballot, taking as is excuse a law that is clearly unconstitutional. No lawyer would admit that a man might do violence to my person or my property and plead an unconstitutional law in justification. Neither could the officer of election plead this unconstitutional law in justification of hampering an elector in the right of franchise. The laws punishing officers of elections are severe.

Hon. M. A. Foran—Yes, I am disposed to think that the law places an educational qualification upon voters, which is unconstitutional. To be sure, no man is so uneducated but that he may learn the difference between the picture of an eagle and that of a rooster, but when it comes to voting a split ticket, if he wants to do that, an explanation might be necessary. I think the constitution contemplates that all electors may vote without even indirect interference.

Judge C. E. Pennewell—I have given the matter no attention, but of one thing I am certain, and that is, that were I an officer of election I should follow the law and refuse assistance to voters wanting to know how to

mark their ballots. Then the voter who might consider himself disfranchised could bring an action against me and the responsibility could ultimately rest on the legislature, where it belongs.

### SUPREME COURT PROCEEDINGS.

THURSDAY, October 20, 1896.  
General Docket.

4821. *Cornelia T. Young et al. v. Silas M. Stone et al.* Error to the circuit court of Cuyahoga county.

MINSHALL, J.

1. Under section 5778 Revised Statutes, authorizing the court in partition proceedings to allow a reasonable fee to plaintiff's counsel, to be taxed as costs in the case, the power conferred is limited to such services as are rendered for the common benefit of all the parties; for services rendered in litigation between parties to the suit, no allowance can be made by the court under this section.

2. Where an attorney makes an agreement with the plaintiff in partition proceedings, whereby he is to receive a certain compensation for his services in the matter, he necessarily waives any right he might otherwise have had to be awarded compensation by the court under the statute; in such case the contract fixes his rights and the measure of the relief to which he may be entitled.

Judgment reversed and motion overruled.

BURKET and SPEAR, JJ., dissent from the second proposition of the syllabus.

4260. *Aultman, Miller & Co. et al. v. Frederick Wilson, assignee.* Error to the circuit court of Columbiana county.

SHAUCK, J.

1. Husband and wife who are co-partners in trade are not entitled either jointly or severally to an allowance in lieu of homestead out of the assets of the co-partnership in the hands of an assignee for the benefit of creditors, until the debts of the co-partnership have been paid in full.

2. When the right to such allowance is disputed, it is the duty of the assignee to await an order of the probate court in the premises, and without such order he makes the allowance at his peril.

Judgment of the circuit court reversed and that of the common pleas affirmed.

5055. *Buslirod Kelch v. The State of Ohio.* Error to the circuit court of Cuyahoga county.

BRADBURY, J.

1. Where, in a trial for murder, the accused sets up his insanity as a defense, he is bound to establish it by a preponderance of the evidence, but should be held to no higher-degree of proof.

2. The proof should be deemed to preponderate in favor of this, as of any other-disputed fact, whenever its existence is made probable upon a full and fair consideration of all the evidence adduced for and against it.

3. An instruction given to the jury in such case to the effect that the evidence introduced to establish insanity is not "sufficient if it

merely show it to have been probable. The proof must be such as to overcome the legal presumption of insanity; it must satisfy you he is insane," requires of the defendant more than a preponderance of the evidence to maintain this defense, and is therefore erroneous.

Judgment reversed.

MINSHALL, J., dissents from the second and third proposition of the syllabus.

4245. *The Lake Erie & Western R. R. Co. v. John Weisel.* Error to the circuit court of Hancock county.

SPEAR, J.

1. Where domestic animals are injured by a railroad train while trespassing upon the track of the company, and the owner of the animals is free from negligence contributing to their injury, the company will be liable for a failure on the part of those operating the train to exercise ordinary care to avoid injury.

2. But, where, in a case of like injury, it is shown that the owner was bound, by contract with the company, to maintain a gate placed by him for his convenience in the fence dividing his land from that of the company's right of way, and the animals get upon the track by reason of the neglect of the owner to perform that duty, liability on the part of the company arises only when it is shown that the injury resulted from the intentional act, or gross carelessness, of those operating the train. *Railroad Co. v. Smith*, 28 Ohio St., 124, approved and followed.

Judgment reversed.

4140. *The Woodland Oil Co. v. Thomas J. Crawford.* Error to the circuit court of Monroe county.

BURKET, J.

1. C. granted, demised and let, by written instrument, a certain tract of land and all the oil and gas in or under the same, to U. and his assigns, for the purpose, and with the exclusive right, of drilling and operating the land for gas and oil for five years, and as much longer as oil or gas should be found thereon in paying quantities, upon the consideration of one dollar paid, and a promise to pay certain rentals for further delay if default should be made in drilling a well within one year, and which instrument had the following forfeiture clause: "And a failure on the part of U. to complete such well or wells as above specified, or instead thereof, to pay the rental as above provided, shall render this lease and agreement null and void, together with all rights and claims, and not binding on either party, and not to be revived without the consent of both parties hereto, in writing." Default having been made in drilling, in an action to recover the promised rental, Held—First—that such instrument is a lease of the land, oil and gas for the limited time and purpose expressed therein. Second—that the forfeiture is for the benefit of the lessor and at his option. Third—that the promise to drill a well or pay rental can not be discharged by a mere failure to perform the promise. Fourth—upon failure to drill the well, or instead thereof to pay the agreed rental, such rental may be recovered by action as rental, and

need not be sued for as unliquidated damages.

2. U. assigned the lease to the oil company, and in such assignment stipulated that the oil company should have and hold the lease under the terms thereof, and under and subject to the rents and covenants therein reserved and contained, on part of the lessee to be paid, kept, done and performed, and the oil company accepted the assignment and received the lease thereunder. Held—that thereby the oil company stepped into the shoes of U., and assumed his obligations, and became liable for the rentals due under the lease.

Judgment affirmed.

3752. The H. B. Claffin Co. et al. v. Aaron Evans et al. Error to the circuit court of Delaware county.

WILLIAMS, C. J.

1. A managing partner entrusted with the sole charge of the business and effects of the firm, may, in case of its insolvency, make a valid assignment of its property for the benefit of its creditors, without having obtained the consent of a copartner who is a nonresident of the state where the business was carried on, and absent therefrom; the assent of the absent partner to the assignment, in such case will be presumed.

2. An assignment for the benefit of creditors takes effect, as to all persons, from the time of its delivery to the probate judge of the proper county; and it is his duty to endorse thereon the exact time of its delivery to him. Revised Statutes, section 6335. Neither the delay of the judge in making the indorsement, nor the indorsement of a date later than that of the delivery to him, though done in obedience to instructions received from the assignor, can postpone the taking effect of the assignment beyond the time of its actual delivery, or affect rights acquired hereby.

3. While the presumption is that the officer performed his duty, and the indorsement speaks the truth, it is not conclusive, but the true time of the delivery of the assignment may be shown by the parties whose interests are affected.

Judgment reversed and judgment rendered for plaintiff in error.

5258. State ex rel. Joseph E. Mark v. V. J. Dahl et al. Board of Deputy State Supervisors of Fayette Co.

In mandamus.

BY THE COURT:

Where one, elected to an office, dies before his term begins, no vacancy is thereby created in the office until the end of the term of the existing incumbent; and if this falls within thirty days of the next proper election (section 11 Revised Statutes), the vacancy cannot be filled by an election thereat.

Demurrer sustained and petition dismissed.

WILLIAMS, C. J., not sitting in the case.

5008. Albert Hays v. The Village of St. Mary's. Error to the circuit court of Auglaize county.

BY THE COURT:

An ordinance of a village prohibiting the

storage within its limits and the transportation along its streets of dynamite or nitroglycerine in quantities larger than five quarts, being within the power conferred upon cities and villages by section 1692 Revised Statutes, and not inconsistent with the provisions of sections 6953 or 8853-7, Revised Statutes, is valid.

4974. The City of Cincinnati v. A. M. James et al. Error to the general term of the superior court of Cincinnati.

Judgment affirmed.

BY THE COURT.

1. When an assessment for a street improvement, whether payable in installments or not, is larger than allowed by law, and sufficient has been paid, though voluntarily, to equal or exceed the amount which could be lawfully assessed, the collection of the remainder of such assessment may be enjoined.

2. In such case the action is not to recover payments already made, but to prevent the collection of unpaid illegal installments.

Judgment affirmed.

4276. John L. Persinger v. George W. Thurston. Error to the circuit court of Fayette county. Judgment affirmed.

4863. The City of Cincinnati v. Andrew J. Pruden. Error to the circuit court of Hamilton county. Judgment affirmed on the authority of *Brannan v. Hotel Co.*, 39 Ohio St., 332.

#### Motion Docket.

2747. Romulus Cotell v. The State of Ohio. Motion for leave to file a petition in error to the circuit court of Summit county. Passed to October 22, 1896.

2748. Hiram P. McKnight v. E. G. Coffin. Motion by plaintiff to dispense with printing record and briefs in cause No. 5263, on the general docket. Motion overruled.

2749. George W. Burns v. Charles H. Dater, assignee, etc. Motion by plaintiff to reinstate and dispense with printing record in cause No. 4981, on the general docket. Motion overruled. No error appearing in the record.

2750. The L. Schreiber & Sons Co. v. Sarah Roache, Admx. Motion by defendant to advance cause No. 5113, on the general docket. Motion allowed.

2751. A. L. Pfau et al. v. The Enterprise Window Glass Co. Motion by plaintiff to amend petition in error in cause No. 4828, on the general docket. Motion allowed.

2752. The State of Ohio ex rel. The Attorney General v. The Manufacturers' Mutual Fire Association of Akron. Motion by plaintiff to confirm report of the trustees in cause No. 3011, on the general docket. Motion allowed.

2753. State of Ohio ex rel. The Attorney General v. The National Mutual Fire Association of Akron. Motion by plaintiff to confirm report of trustees in cause No. 3012, on the general docket. Motion allowed.

2754. *Brastus M. Smith, Admr. et al. v. F. T. Cahill, Admr.* Motion by plaintiff to reinstate cause No. 4412, on the general docket. Motion allowed.

2755. *The State of Ohio v. Glen A. Emery.* Motion by plaintiff to advance and assign for oral argument cause No. 5274, on the general docket. Motion allowed and request for oral argument noted.

2756. *C. A. Gates, Admr., v. The Tippicanoe Stone Co.* Motion by plaintiffs for further time to file briefs in causes Nos. 4457 and 4542, on the general docket. Motion allowed and time extended to December 1, 1896.

### New Cases.

Filed in the Supreme Court since October 14, 1896.

5271. *Mary Ann Mathews et al. v. Samuel T. Seltzer, Exr., et al.* Error to the circuit court of Franklin county. Robert Dubois and J. S. Priesner, for plaintiffs. John J. Stoddard and J. T. Holmes, for defendants.

5272. *Walter Plummer v. The State of Ohio.* Error to the circuit court of Williams county. J. M. Richie and Scott & Schreiber, for plaintiff. F. S. Monnett, attorney-general, and John M. Killits, for defendant.

5273. *Michael Fraubauer et al. v. Olive E. Graham et al.* Error to the circuit court of Mahoning county. Geo. F. Arrell, and N. C. McNab, for plaintiffs. Horace T. Smith, W. A. Maline, R. B. Murray, E. F. Lynn and A. J. Woolf, for defendants.

5274. *The State of Ohio v. Glen A. Emery.* Error to the circuit court of Lucas county. J. M. & W. F. Brown, for plaintiff. King & Tracy, for defendant.

5275. *Sarah S. Carter, administratrix, v. The City of Zanesville.* Error to the circuit court of Muskingum county. King & Browning, for plaintiff in error. Chas. G. Griffiths and Durban & McDermott, for defendant.

5276. Same parties, same attorneys.

5277. *W. W. Edge et al. v. Geo. W. Scott et al.* Error to the circuit court of Miami county. H. H. Williams and A. F. Broomhall, for plaintiffs. Clyde & McPherson and Geo. S. Long, for defendants.

5278. *C. C. McBeth v. John Richey.* Error to the circuit court of Brown county. McBeth & Harrison, for plaintiff. Young & Barnes, for defendant.

5279. *Geo. W. Scott et al. v. W. W. Edge et al.* Error to the circuit court of Miami county. Clyde & McPherson and Geo. S. Long, for plaintiffs. H. H. Williams, for defendants.

5280. *The Citizens' National Bank of Urbana v. The Third National Bank of Dayton.* Error to the circuit court of Champaign county. Warrick & Eichelberger, for plaintiff.

5281. *Reuben F. Chase v. William Brindaige.* Error to the circuit court of Morrow county. Theo. S. White, for plaintiff. Olds & Olds, for defendant.

Judge Sage has filed an opinion in which he dismisses the suit of the Inter-state Commerce Commission against the C., N. O. & T. P. Ry. Co., et al. The contention of counsel for the commission was that they have the right to prescribe the maximum rates which may be charged for the transportation of freight. Judge Sage says this would be in effect a right to dictate an indispensable and one of the most important terms of the contract between the carrier and the shipper, and he holds that the commission is not clothed with the power to thus fix rates.

The supreme court handed down a decision Tuesday sustaining the petition of Bushrod Kelch, the Cleveland wife murderer, for a new trial. Just upon what ground the court granted the new trial is not known, but it is thought by those who were connected with the trial that the error lay in the charge of Judge Oug to the jury on the question of insanity.

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## COMMENDATIONS.

The following selections give the pith of some of the many commendatory letters we have received from time to time. Want of space prevents our giving all the letters, and we submit these few as specimens of the whole.

A well known lawyer in northern Ohio writes:

"The Ohio Legal News, I believe is the best legal paper ever published in Ohio."

Another says:

"I have been a subscriber to all the other Ohio law papers published within the last thirty-five years, and am frank to say that yours is ahead of any one of them."

A leading member of the Cincinnati bar says:

"You have made hustling times with your competitor, and although you have made him improve his paper considerably, it is yet far behind yours."

An attorney of prominence at Columbus says:

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A distinguished attorney in central Ohio writes:

"Allow me to congratulate you on the excellency of the Ohio Legal News. I consider it the best law journal in existence to-day."

A well known ex-judge, upon return to practice wrote:

"I have become in the habit of relying upon your Legal News to keep myself posted in the matter of current decisions, and items of news, while upon the bench, and I should be unable while in the practice to go ahead with proper assurance, if I did not subscribe for the News."

A retiring circuit court judge wrote us:

"You have not only set the pace for competitors, but made it so rapid that they do not appear to be in the race. I am unable to see how a lawyer can be without your paper."

Another member of the bench says:

"Containing as it does so many of the current decisions of interest not published elsewhere, it seems impossible that a lawyer, who aims at success can permit himself to go without it."

Another writes:

"I like your plan of publishing the decisions. It will be a good thing to furnish the profession with the bound volumes as rapidly as completed. I like also the good fat volumes you are publishing."

The refusal to sell soda water to colored persons in a drug store is held, in *Cecil v. Green* (Ill.), 32 L. R. A., 566, not to be a violation of a civil rights act respecting "places of public accommodation and amusement," since these do not include a drug store.

The appointment of women to be notaries public is held, in opinion of the Justices (Mass.) 32 L. R. A., 350, to be beyond the authority of the legislature under the constitutional provision that notaries shall be appointed "in the same manner as judicial officers are appointed."

One who in good faith makes grass into hay with the knowledge of and without objection by the owner, under the belief that he has a right to do so, whereby its value is greatly increased, is held, in *Carpenter v. Lingenfeller* (Neb.) to have acquired the title to the hay on which he can sustain an action of replevin, although he is liable for its value at the time of its conversion.

The supreme court of Arkansas, in an opinion by Justice Ruddick, last Saturday, held that the governor has the right to appoint members of the legislature where a vacancy exists and has been caused by death, resignation or other causes, and further that a representative is an officer and the position he holds an office, and that where vacancies occur in such offices the governor has the power to fill by appointment until the next general election. This is said to be the first case of this character decided in any state in this country.

On a deposit of one's own money to his own credit in a savings bank the fact that he names himself as trustee for another is held, in *Cunningham v. Davenport* (N. Y.), 32 L. R. A., 373, to be insufficient to show that he intended to create a trust, when he states to the contrary and retains possession of the bank book without disclosing or publishing the trust or informing the proposed beneficiary of the transaction. But the words "In trust for" in an entry of a savings bank deposit and on the depositor's book are held in *Bath Savings Institution v. Hathorn* (Me.), 32 L. R. A., 377, to create a *prima facie* trust which will avail as a trust or gift in favor of the donee as against the donor's estate, where all the donor's declarations, acts, and conduct are consistent with the presumption arising from the entry.

The supreme court granted a new trial to Romulus Cotell, who was sentenced to hang November 6, for the murder of the Stone family at Talmadge last March.

The case was reversed on error in the judge's charge regarding the evidence necessary to prove insanity.

A promise to pay an expert witness a reasonable compensation in addition to statutory fees, when he is engaged in advance of the trial, is held, in *Barrus v. Phaneu* (Mass.), to be based on sufficient consideration and the right thereto is held not to be waived by afterwards testifying on receipt of statutory fees, without first claiming the promised compensation, even if he is not asked any questions calling for his opinion as an expert.

Judge Pugh, of the Franklin common pleas court, decided a test case brought under the Pure food laws. One Breckenridge, who was convicted of selling adulterated mustard, carried the case up, and the point at issue being whether the defense in cases of this kind were entitled, for the purpose of analysis, to a sample of the article in possession of the state on which the prosecution was based. Judge Pugh, decided that the defense had a right to have a sample on certain conditions; these conditions are that the court must appoint the expert who is to make the analysis for the defense, and the analysis must be conducted in the presence of the expert who made the analysis for the state. The motion for an analysis in behalf of the defense must not be made for the purpose of annoying the state; it must not be made out of mere curiosity; it must not be made for the purpose of disclosing what evidence the state has, but it must be shown by the defense that they have no other way of making a defense as to the ingredients of the article in question except by securing part of the article which the state is in possession of. Judge Pugh held that it was not obligatory on the court to appoint an expert and cause an analysis for the defense, but it was a matter of discretion with the court, and the above conditions should govern the court in its decision. When such an application is made, and the court could not appoint whoever he pleased to make the analysis for the defense and was not bound to follow the suggestion of the defendant, and upon this point he sustained the justice.

**A FRONTIER JUSTICE.**

Detroit Free Press: They were discussing the administration of justice in this and other countries when the Major told this story to illustrate a claim made in the course of his argument:

"When out on the frontier trying to disprove the adage that a rolling stone gathers no moss, I became pretty well acquainted with a rugged old pioneer who came dangerously near to being an absolute monarch in his community. All the legalized authority he exerted was that of a justice of the peace, but it was astounding how far he could make it go. The whole judicial system does not contemplate a greater power than he exerted through his little office.

"On one occasion a drunken rustler only shot and killed a hog that happened to be the Squire's property. He sat right down and drew an affidavit for the arrest of the offender. Then he stood up and swore himself in as a special constable, pinned a cheap star on his breast, took his Winchester, mounted his horse and went after the hog-killer. The special constable of his own making got the drop on his man and returned with him as a prisoner.

"Then you should have heard the trial. The Squire first read the charge to the accused, who entered a plea of 'not guilty.' Then the court stepped to the front of his own bench, which was a rough redwood table, and conducted the prosecution, asking himself questions and answering them, allowing the prisoner to enter an objection or take exception whenever he desired.

"The case for the people being made, the Squire said the fellow must have a fair trial, and appeared as lawyer for the defense. So long as he was acting his roll and the rustler was doing the swearing, it looked as though he might be acquitted. But again the Squire became the prosecutor for purposes of cross-examination, and the way he showed the desperado up looked as though it might be a life sentence. After arguing both sides, with a rousing close for the prosecution, the Squire resumed the bench, summed up the evidence, quoted such law as he knew, gave the prisoner at the bar a scathing dressing down, fined him \$10, and sentenced him to six months in jail, which he was without the slightest right of doing. This was in the United States, mind you."

**STUDENTS AS ELECTORS.**

Secretary of State Taylor, who is state supervisor of elections, was appealed to some time ago for a decision on the question of the right of students from other parts of the state to vote in the city of Columbus. The point was raised last year that the students had no right to vote, and as a result considerable challenging was done. Thus, to obviate any difficulties that might arise, the secretary of state issued the following letter to the election officers of the city of Columbus, and which applies to any city having colleges with non-resident students in attendance:

*To the Precinct Election Officers of the City of Columbus:*

GENTLEMEN: Frequent inquiry has been made at this office as to the right of students of Ohio State university and the several medical colleges of this city to vote at the coming election in the several precincts in which they reside. As I apprehend the law, a student at any or either of the universities, who is of legal age and who has resided in the state a year, and in Franklin county thirty days, and in the precinct twenty days, if a single man, has the right to make a choice of residence in the ward and precinct in which he resides, if he so desires. The question who supports him or pays his college expenses, etc., does not enter into the case; neither does the fact whether he has previously regarded some other place as his home, as, for instance, the place where he came from when he entered the college. If he has resided in the precinct where he offers to vote the length of time required by law, if he offers to vote it is *prima facie* evidence that he has concluded to change his habitation, which he has a perfect right to do. In other words, he has gained a residence in Franklin county. What he may do in the future, or what may be his intentions as to the future, has nothing to do with his present right. That is a contingency that the election officers are not called upon to inquire into. If you are satisfied that he has been in the county a sufficient number of days, and in the ward and precinct the required time, and are also satisfied that he is a citizen of Ohio of legal age, I assume it to be your duty to accept his vote.

Very respectfully yours,

SAMUEL M. TAYLOR,  
*Secretary of State.*

### FELLOW SERVANT ACT.

The constitutionality of the Ohio act of 1890 relating to railway employers, will soon be determined by the United States circuit court of appeals, of Cincinnati. This act provides, among other things, that a railway employee who has men working under his direction, such as a conductor, is a superior and not a fellow servant of such men and that the company is liable for any injury which an inferior employee may sustain by reason of the negligence of the superior. Another section of the act relates to railway insurance companies and was declared unconstitutional by Judge Ricks in the celebrated *Shaver case*, and reported in Vol. 1, O. F. D., 221.

The action in which this statute is to be tested is *Van Dusen v. Receiver T., St. L. & K. C. Ry. Co.*, in which it appears that Van Dusen was a switchman employed in the Toledo yards, and while in the course of his employment suffered injury which necessitated the amputation of a part of his right hand, which he claims was because the conductor under whom he was working, ordered the engine to back up against the car at which he was at work, a second time without giving him any warning.

It will be urged on behalf of the receiver that the act mentioned above, entitling the plaintiff to damages, is unconstitutional because it is a special act applying only to railroad companies and not of general operation.

A decision on this point will be of great interest to railway men as it involves the right to sue for damages for injuries in a large class of cases.

### THE OFFICIAL BALLOT.

The opinion of Judge Montgomery, of the supreme court of Michigan, in the official ballot case, is interesting reading for the legal profession as well as for the voters. Its importance as law is increased by the fact that the judges on the bench concurred in the decision.

The court says that the Baker ticket, the fusion populist and silver ticket, which is described as a combination list of candidates made up of the nominees of two other parties in addition to the claimants of the regular democratic name, "cannot be treated as the ticket of the democratic organization of years ago."

Judge Montgomery says in substance that while the democratic state convention assented to the nomination of the joint ticket com-

posed of democrat, silver and populist candidates, neither one of these parties retained the power to name the candidates of the convention; that is no party name was adopted by the convention of factions.

On the other hand, it is admitted that the National Democratic candidates were nominated by a convention which lacked some elements of regularity under the call by which it assembled. But the decision says "it was composed wholly of men who had acted with the Democratic party."

The Nebraska decision is substantially on the same lines of facts and legal construction. The secretary of state, under whose orders the judicial ballot is prepared, said: "The ticket of the National Democracy, to which exception is taken in this instance, is the only regularly recognized Democratic party in the state of Nebraska called by its regular convention and is entitled to go on the official ballot as such." Proceedings were adopted to set aside by a judicial order this decision of the state officer who controls the order in which the lists of candidates are placed on the official ballot. The court sustained the secretary of state on the ground that the regular Democratic organization was that supporting Palmer and Buckner.

The decision of the supreme court of both states held that the political organization represented by the Bryan candidates for electors and for state officers are irregular. They decide that the National Democratic ticket is entitled to its proper name and to precedence on the official ballot.

The New York decision is substantially the same, though not all the questions raised in Michigan and Nebraska are involved. The name of the National Democrats is placed over their list of candidates.

### USE OF PUBLIC STREETS.

One of the most notable decisions regarding the respective rights of corporations and the public in the use of public streets, was recently handed down by the appellate court in the case of *The General Electric Railway Co., appellant v. Chicago City Railway Co., appellee*, of Cook county, Illinois. The decision was prepared by Justice Waterman, who in an able and conclusive opinion announces and sustains the right of the public in the streets, which have in these latter days been practically treated as obsolete by corporations securing the use of the highways for transportation purposes.

In the suit in controversy it was claimed by the railway company that it secured an exclusive right to the use and occupancy of a public street for traffic purposes, it having se-

cured such right through an ordinance granting the same. In refuting this claim, Justice Waterman, says in part:

"The rails which the complainant placed in the street are doubtless its property. It paid for and placed them there, and may consistently, with its obligations to the public in a reasonable manner, remove such rails, replacing them with others. But it has no exclusive rights to use them at all in the street except as part of it. These rails are for its cars to run on, but thousands of other vehicles may and do incidentally lawfully make use of such rails in the ordinary course of business.

It has been held, however, that the habitual use of street railway tracks by a coach company engaged in carrying passengers for hire in competition with a railway company is an infringement of its rights. \* \* \*

The supreme court has lately said:

"It cannot be too often repeated that the streets of a city belong to and are for the use of the public. In the nature of things the public domain and the public right are things which will be continually encroached upon by individuals. The writer of this opinion is inclined to regard this and other cases brought by abutting property owners seeking to restrain the use of the streets for public purposes as an entering wedge toward wresting from the public the control of its streets."

"That the authority of the public in this regard has not always been wisely exercised is quite true, but it is an authority and a control essential to the most cherished rights of the citizen. It is stated that the frontage act confers upon the abutting property owner a new right of property which the courts will protect by the writ of injunction. The statute does not in terms create any new property right, neither does it declare that the power therein intrusted to the abutting owner shall be secured to him by injunction. If it is a grant of a property right, which may be exercised for the emolument of the property owner alone, without reference to and in contemptuous disregard of the wish and interest of the public, it was a grant of a most important and most valuable property without consideration."

As to the rights and interests of the corporation in the street the Justice says:

"In this case, as in others, there is no pretense by the abutting owner that he is acting in the least in the interests of the public. The corporation, created to serve the public, enjoying most valuable franchises, given to it in consideration of public service to be by it

rendered, comes into court and asks that, by a writ of injunction, it shall be protected from a use of the public streets for the public service. In so doing it is entitled to the protection accorded to any property owner, including that of an abutter. In the domain of sentiment more is demanded from the strong intellectually and physically than from the weak, as well as more required from the rich than from the poor, but at the bar of justice all persons are equal."

The complainant contended that the defendant was a trespasser, to which the Justice replied:

"It is strenuously insisted that the defendant is under the stipulation in this case to be regarded as a mere trespasser, and we are asked if the complainant is to see its property interfered with by a gang of freebooters, and if we will permit the defendant, whose ordinance was, it is said, admitted to have been conceived in fraud and begotten in iniquity, thereunder to construct and operate a railroad in the streets of Chicago. Even freebooters have rights. The police may arrest but a court will not by injunction restrain their walking the streets. The vilest reprobate is, happily, in this land, entitled to be heard and tried in accordance with the law of the land, and whatever may be our opinion of the conduct of the defendant, we are in this proceeding to accord to it, as to the complainant, such rights as by the law each is entitled to."

#### THE BARR CASE.

The Barr electoral case, which was a mandamus proceeding brought to secure the removal of Mr. W. F. Barr's name from the Australian ballot, was argued before the supreme court Monday afternoon, at which all the judges sat with the exception of Chief Justice Williams, who did not sit on account of his being a candidate for re-election.

Judge George B. Okey and Mr. George A. Fairbanks appeared for the relator, Chairman Thomas H. Fitzsimmons of the populist state executive committee, and ex-Attorney General Richards represented Secretary of State Taylor.

Judge Okey argued that the election law did not prescribe any time within which the secretary of state must certify the ballot to the deputy supervisor. The only provision was that the ballots, poll books, etc., must be in the hands of the election judges three days before the election. The law did not provide specifically for the case of Barr. There was no limit of time within which a candidate could withdraw or die. It was the imperative duty of the secretary of state to send out the ballot at some time, but the time was not the es-

sence of the matter. What was essential was that the ballot transmitted must be the true form. The provisions defining the secretary of state's duties in reference to vacancies is merely directory and not mandatory, and it is within the authority of the secretary of state to provide for the removal of the name, under his general authority as state supervisor of elections, and if the secretary of state has sent out the ballot prematurely, and so lost control of it, he should be mandamus'd to correct it.

In reply, Mr. Richards points out that the statute provides that a candidate's withdrawal to be effective, must be twenty days before the election. After that time the only provision is for filling vacancies after the ticket is printed up to ten days before the election. The section of the election laws was cited, in which it is stated that objections or other questions arising in the course of the nomination of a candidate for a state office, shall be considered by the secretary of state and his decision shall be final. This was held to prove conclusively that the secretary of state's authority was final in the present case. In addition, it had been fortified by the decision of the supreme court in the case of *Chapman v. Miller*. Mr. Richards further argued that there was clearly no authority given by the statute for a withdrawal after twenty days before elections. The fact was also presented that the greatest latitude possible under the statute had been given for any candidate to withdraw, the ballot not being made up and sent out until October 14, the last day upon which, under the law, a candidate on the state ticket could withdraw. Mr. Richards argued that the public welfare demanded that the limit be fixed to the withdrawal of a candidate, and the law has placed this at twenty days before the election, in case of a candidate on the state ticket, and fifteen days on county tickets. The point was made that time must be allowed for the proper making up and printing of the ballots, which would be impossible if a candidate should be permitted to withdraw at any time. It would be impossible to execute the law unless its provisions for filing and certifying the nominations and sending out the ballot were mandatory upon the secretary of state.

Mr. Fairbanks closed for the relator and called attention to the importance of the matter as affecting the result of the election. He claimed that leaving the name on the ballot was calculated to confuse the voters and cause

mistakes which might determine the election as against the will of the people.

The judges remained in consultation some time after the arguments had been concluded, and on Tuesday the supreme court handed down its opinion, in which it sustained the rulings of secretary of state, Taylor, in refusing to allow the name of Barr to be removed from the Australian ballot, and the application for a writ of mandamus to compel the secretary of state to order the name taken from the ballot was rejected and the petition dismissed.

### SUPREME COURT.

COLUMBUS, O., *October 27.*

#### General Docket.

The following decisions were handed down by the supreme court today:

3588. *E. M. Haigler v. John Logan*. Error to the circuit court of Fayette county. Judgment affirmed. Williams, C. J., not sitting.

4286. *The Farmers' National Bank of Findlay, O., v. E. Morton et al.* Error to the circuit court of Hancock county. Judgment affirmed.

4300. *Vincent H. Coons v. The Farmers' National bank, Findlay, et al.* Error to the circuit court of Hancock county. Judgment affirmed.

4337. *F. J. Wilson v. Randall Ayers*. Error to the circuit court of Preble county. Judgment affirmed.

4348. *Amanda E. Stichtenoth v. Christ Rife*. Error to the circuit court of Hamilton county. Judgment affirmed.

4352. *James M. Moody, treasurer, et al. v. William T. George et al.* Error to the circuit court of Morrow county. Judgment reversed and cause remanded with instructions to sustain the demurrer and for further proceedings. Minshall, J., dissents.

4375. *S. E. Brown et al. v. Lorenzo F. Hull*. Error to the circuit court of Hancock county. Judgment reversed on the authority of *Railway Company v. Wright*, 54 Ohio St., 35 W. L. B. 226, and cause remanded to circuit court with instructions to pass on questions presented by the bill of exceptions.

4379. *George W. Shower v. The City of Marion et al.* Error to the circuit court of Marion county. Judgment reversed and cause remanded to the circuit court with instructions to overrule demurrer and for further proceedings.

4385. *Catherine Reed et al. v. The German Baptist Church et al.* Error to the circuit court of Miami county. Judgment affirmed.

4388. *Mary E. Cheney v. Charles Butler*. Error to the circuit court of Franklin county. Judgment affirmed.

4397. James W. Penfield et al., partners, v. Terrence O'Neil. Error to the circuit court of Lake county. Judgment affirmed.

4823. The Wheeling & Lake Erie Railway Company v. William S. Fox. Error to the circuit court of Huron county. Judgment affirmed.

4871. Franklin Alter v. The City of Cincinnati. Error to the circuit court of Hamilton county. Judgment of the circuit court reversed and that of the common pleas affirmed.

4897. Alexander G. Patton v. The Pittsburg, Cincinnati, Chicago & St. Louis Railway company. Error to the circuit court of Franklin county. Judgment affirmed.

5284. The State of Ohio ex rel. Thomas G. Fitzsimmons v. Samuel M. Taylor, secretary of state, etc. Petition in mandamus. Writ of mandamus refused and petition dismissed. Williams, C. J., not sitting. To be reported.

#### Motion Docket.

2744. Romulus Cotell v. State of Ohio. Motion for leave to file petition in error to the circuit court of Summit county. Motion allowed, execution of sentence suspended, and cause submitted.

2757. John J. Wine, administrator, v. Louis Drach et al. Motion by plaintiff for leave to file petition in error to the superior court of Cincinnati. Motion overruled—leave not required.

2758. Franklin Alter, a taxpayer, v. The City of Cincinnati. Motion by defendant to advance cause No. 5136 on the general docket. Motion allowed.

2759. Thomas M. Stacy v. The State of Ohio. Motion for leave to file petition in error to the circuit court of Stark county. Motion allowed. Cause advanced.

2760. Hiram P. McKnight v. E. G. Coffin. Motion by plaintiff to advance cause No. 5263 on the general docket. Motion overruled—being prematurely made.

2761. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company v. Matthew Johnson. Motion by defendant to advance cause No. 4888 on the general docket. Motion allowed.

2762. Palmer & Crawford v. William Tingle. Motion by plaintiff to advance cause No. 4839 on the general docket. Motion allowed.

#### New Cases.

New cases filed in Supreme Court since October 21, 1896.

5282. John Shook et al. v. Chester Bedell. Error to the circuit court of Trumbull county. L. F. Hunter for plaintiffs. J. F. Wilson for defendant.

5283. The S. & C. S. L. Ry. Co. v. Carrie Spaulding. Error to the circuit court of Delaware county. R. P. Guerin for plaintiff. McElroy & Carpenter, for defendant.

5284. The State of Ohio ex rel. Thomas G. Fitzsimmons v. Samuel M. Taylor, Sec'y of State. Mandamus. George B. Okey and Geo. A. Fairbanks, for plaintiff. F. S. Monnett, Atty. General, and J. K. Richards, for defendant.

5285. Allen Andrews, Assignee, v. Mary Johns, Jr., et al. Error to the circuit court of Butler county. Morey, Andrews & Morey, for plaintiff. Morey, Andrews & Morey, P. C. Conklin, Haines & Belden & Fitton, for defendants.

5286. William S. Gibbs v. The Dayton, Lebanon & Cincinnati Ry. Co. Error to the circuit court of Warren county. W. F. Ettzroth, for plaintiff. B. F. Paxton, for defendant.

5287. E. E. Crockett v. The Lebanon Academy et al. Error to the circuit court of Warren county. W. F. Ettzroth, for plaintiff. F. M. Cunningham, for defendants.

5288. Bradford Shinkle v. The Industrial Building and Loan Association Co. Error to the circuit court of Hancock county. Barber & Fuller, for plaintiff. W. W. Shuler, for defendant.

5289. The C., L. & W. R. R. Co. v. Ida L. Reed. Error to the circuit court of Tuscarawas county. Healea & Green, for plaintiff. Bailey & Douthitt, for defendant.

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The following selections give the pith of some of the many commendatory letters we have received from time to time. Want of space prevents our giving all the letters, and we submit these few as specimens of the whole.

A well known lawyer in northern Ohio writes:

"The **Ohio Legal News**, I believe is the best legal paper ever published in Ohio."

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"I have been a subscriber to all the other Ohio law papers published within the last thirty-five years, and am frank to say that yours is ahead of any one of them."

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"You have made hustling times with your competitor, and although you have made him improve his paper considerably, it is yet far behind yours."

An attorney of prominence at Columbus says:

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Where goods were sold for cash, to be paid for on delivery, the pre-payment of the price being a condition precedent of the sale, the mere fact that the buyer obtained possession did not operate to pass the title to him, and, notwithstanding such possession, the title remained in the seller, the purchase money not having been paid. *Bergon v. Magners*, (Ga.), 25 S. E. Rep., 570.

Judge Koons at Muncie, Ind., quashed an indictment against a woman, it being charged that she was white and was married to a colored man. The court ruled that the law does not make it an offense for a white woman to marry a colored man, but that it does for a colored man to marry a white woman. This is a distinction so delicate and knightly that while it might be accorded appreciative recognition in the days of bygone fictions, it can hardly be appreciated by the bench and bar of to-day.

The circuit court of Miami county handed down a decision of great importance throughout Ohio, rendered in the suit to test the constitutionality of the indirect or collateral inheritance tax law. The court holds that the law is constitutional, and sustained the suit to mandamus the probate judge into appointing appraisers to determine the amount of tax to be paid by the administrator of a decedent's estate. In order to test the law, the plaintiff filed his petition, to which the attorneys for the state demurred. The court decided the case on the demurrer, sustaining the position taken by the plaintiff. The case is to go to the supreme court.

Rehrick Bros. of Fostoria, publishers of county atlases, have brought suit against a number of prominent citizens of that city to recover \$14 each, the subscription price of an atlas published and delivered several months ago. The parties against whom suit has been brought objected to the atlas as soon as they had examined it, refusing to pay on the ground that they were not by any means up to what they were represented to be when the subscriptions were taken. The case against one of the parties is to be a test case. Judgment has been rendered against him by default in the justice court, and the case has been carried to the common pleas court. A decision in this case will be of great importance to publishers of books, and to subscribers for the same.

A postnuptial settlement, made when the husband is indebted, is fraudulent and void against his creditors, and will be taken as voluntary unless those claiming under it can show a valuable consideration. *Flynn v. Jackson* (Va.), 25 S. E. Rep., 1.

In an action to recover an organ, under a chattel mortgage to secure the price, defendant testified that plaintiff's agent, who held the notes for collection, had testified on a former trial that an order previously given him by defendant's father had been accepted by him in full payment of the notes; such evidence was held inadmissible, it being the admission of an agent after the act. *Estey v. Birnbaum* (S. Dak.), 68 N. W. Rep., 290.

A mortgagee who accepts a deed of land in payment of his debt cannot rescind the contract, on the ground that the land deeded him was not the land viewed by him, when he could have discovered such fact by ordinary care, and the mortgagor was not responsible for his failure to discover it. *Beebe v. Birkett*, (Mich.), 67 N. W. Rep., 966.

Where several defendants are charged as joint tort-feasors, a release of any one of them, by withdrawal of the action against him on the payment of a sum agreed upon between him and the plaintiff operated to release other defendants from further liability. *Chetwood v. California Bk. of San Francisco* [Cal.], 45 Pac. Rep., 704.

Where a crop, to be thereafter raised, harvested, and threshed, was sold before the seed was sown, it was held, that the contract of sale was not executed, but an executory contract, and on the evidence the jury were not warranted in finding that the title passed until the grain was ready for delivery. *Wetter v. Hill*, (Minn.), 68 N. W. Rep., 26.

The lien of a creditor acquired by attachment of real estate, the title to which is in the debtor, although the attachment is made without notice that his debtor has conveyed it to a bona fide purchaser, is defeated by actual notice of such conveyance, received before he levies his execution thereon, or has lawfully applied it to the satisfaction of his debt. *Reynolds v. Haskins*, (Vt.), 35 Atl. Rep., 349.

Where land was conveyed by a husband, through *mesne* conveyances, to his wife, in order to delay creditors, a subsequent purchaser from the husband cannot attack the deed to said wife, and set it aside, for fraud; nor can he claim to be an innocent purchaser, without notice, where the deed to said wife was registered prior to his subsequent purchase. *Hartson v. Lyons* (Tenn.), 36 S. W. Rep., 852.

Where a mortgage is 20 years overdue, and there is no proof that during that period that the mortgagor or his assignee in possession has made any payment upon it or otherwise recognized its existence, it is presumed to have been paid; this presumption is not rebutted by the fact that the owner of the mortgage and the owner of the equity of redemption during this period were brother and sister. *Magee v. Bradley* (N. J.), 35 Atl. Rep., 103.

In an action for personal injuries resulting in death, it was held that an employee of a railroad riding on its train as a passenger is not a free passenger, though his ticket is such as the company issues only to its employees working in a certain city and living at some other city on its line. *Doyle v. Fitchburg R. R. Co.* (Mass.), 44 N. E. R., 611.

Where a servant quit the employment of his master before the expiration of the term for which he had contracted, and the employer, with knowledge of such fact, stated that he would not pay him any more wages until the expiration of the term, such statement is equivalent to a promise to pay at that time, and is a waiver of the breach of the contract by the employee, which entitles him to recover the contract wages for the time he worked. *Merrill v. Fish*, (Vt.), 35 Atl. Rep., 368.

Where the vendor of goods makes statements as to the quality of the article, but accompanied by an express and positive refusal to warrant it, and a like notice to the vendee that he will not and does not warrant it; his statements as to quality must be deemed mere expressions of opinion, and not a contract of warranty, at least in the absence of any fraud or deceit, and where the property is present for the inspection of the vendee. *Lynch v. Curfman*, (Minn.), 68 N. W. Rep., 5.

Where on a settlement of mutual accounts, defendant executed to the other party a bond for the balance due, and during the two years that the other party lived thereafter, no objection was made to the correctness of the settlement, equity will not reform or cancel the bond, in an action thereon by the executor of the obligee, on the grounds of mistake in the accounting, unless a full statement of the account can be made, and the mistake clearly appears. *Persinger's Admr. v. Chapman* (Va.), 25 S. E. Rep., 5.

In an action to foreclose a mortgage given to a building association, the certificate of stock held by the borrower in the association, and which is referred to in the note and mortgage, is admissible in evidence; under provisions in a note and mortgage to a building association that the entire amount secured shall become at once due and payable on default for three months in the payment of interest and installments of stock, while the right to act on such default becomes absolute in the association at the end of the three months, it is not compelled to so act at once in order to protect its rights, and when it does not, it is entitled to an accounting in accordance with the original contract to the time when it elects to foreclose. *U. S. Sav. & Loan Co. v. Cade* (Wash.), 45 Pac. Rep., 656.

The coroner of Cook county [Ill.], was recently garnisheed in a case in which a dead man was sued for board, to get the money found on the man at the time of his death. The defendant during life had boarded with the plaintiff, and died leaving an unpaid board bill, for the amount of which the plaintiff sued out a garnishee attachment writ making an affidavit in which he stated "that he (plaintiff) does believe that the said defendant (deceased) had departed from this state with the intention of having his effects removed from this state for the purpose of cheating and defrauding his creditors." The coroner, as garnishee, made answer by producing the records of the inquest, and moved the case be dismissed for want of jurisdiction as the defendant was dead. The plaintiff objected to this, and insisted on serving notice on defendant by publication, but Justice Hall, with rare discrimination, held that there was no presumption of law that a dead man could read such a notice and make the legal answer required, and dismissed the case.—*Chicago Law Journal*.

The law does not impose upon a party who produces an article for sale the duty of exercising diligence and prudence that he may seasonably discover that an agent or clerk specially employed by him to sell his wares, and clothed with no other authority, apparent or real, is so far exceeding his authority to sell as to engage in purchasing from rival concerns, on his employer's account, the very article the latter is producing and selling. *Finance Co. of Penn. v. Old Pittsburg Coal Co.* (Minn.), 68 N. W. Rep., 70.

In a proceeding for condemnation, it was held that the proceeding, the object and purpose of which is to enforce, between parties, a right to condemn land under the constitution and laws of a state, is a suit which may be removed to a Federal court, when the parties are citizens of different states; and further that when an application is made, under state laws, to condemn a portion of a large tract of land, the whole of which is owned in fee by a defendant who is a citizen of another state than the applicants, and a small part of which, including some of the land sought to be condemned, has been leased by him to another defendant, who is a citizen of the same state as the applicant, there is a separable controversy between the applicant and such first named defendant as to the land not leased, which can be removed to a Federal court, on the ground of diverse citizenship. *Sugar Creek & C. Co. v. McKell*, (W. Va.), 75 Fed. Rep., 34.

The supreme court of Vermont, reviewed in an exhaustive manner, the question as to proof of death by general reputation, holding that "general reputation in the family," which is admissible in matters of pedigree, or to establish the facts of birth, marriage or death, is confined to declarations of deceased members of the family, and family history and traditions handed down by declarations of deceased members in either case made *ante litem motam*, and originating with persons presumed to have competent knowledge of the facts stated; and evidence of the opinion or belief of the living members of a family as to the death of another member is not within the rule and is inadmissible, and that a person's death cannot be established by general reputation among his living friends and acquaintances. Two of the members of this court dissented. *In re Hulburt's estate*, 35 Atl. Rep., 77.

In a criminal prosecution for bigamy, while a presumptive marriage, based on cohabitation and repute, cannot be established to defeat a subsequent marriage in fact, yet cohabitation and reputed marriage are facts receivable in the proof of a marriage in fact, and a man charged with bigamy is entitled to show that the woman to whom he was first married had previously claimed, and was reputed, to be married to another man, with whom she lived and cohabited for a number of years, and who was still living at the time of her marriage to defendant, as evidence in support of his claim that his first marriage was void. *State v. Sherwood* (Cal.), 45 Pac. Rep., 986.

Section 2, article 4, of the constitution of the United States, places citizens of each state upon the same footing with citizens of other states so far as the advantages resulting from citizenship in those states are concerned, and inhibits discriminating legislation against them by other states; it insures to citizens of one state the same freedom possessed by citizens in other states in the acquisition and enjoyment of property and pursuit of happiness, and guarantees to them in other states the equal protection of their laws. The privileges and immunities thus secured to citizens of each state in the several states are those which are common to the citizens in other states under their constitution and laws, by virtue of their status as citizens. *State v. Bd. of Ins. Comrs.* (Fla.), 20 So. Rep., 772.

After a jury has been impanelled and sworn in a criminal case, the trial cannot stop short of a verdict without the consent of the defendant, except for imperative reasons, such as the illness of a juror, the judge or the defendant, the absence of a juror, or a disagreement. Therefore, when a case, after the trial has commenced, is withdrawn from the jury on account of the absence of a witness for the state, the defendant has been once placed in jeopardy and may plead it in bar of another trial, unless he consents thereto; and such consent is not established by the mere fact that a defendant without counsel does not object to the withdrawal of the case from the jury, and the postponement of the trial, nor will that fact constitute a waiver of his right to plead the withdrawal in bar of another trial for the same offense. *State v. Richardson* (S. C.), 25 S. E. Rep., 220.

**TECHNICALITIES IN CRIMINAL CASES.**

Illustrations are numerous of the quibbles successfully resorted to by the adroit criminal lawyer to ward off justice from the notoriously guilty. But seldom do counsel for a criminal dare stand upon the simple issue of guilt or innocence. The instances given below are exemplifications of the utter foolishness that still inheres in our criminal practice, and of the questionable extent to which criminal courts go in their strained interpretations of the fundamental rules of criminal law:

P. was indicted for the murder of Robert Kain. The case was fully proven, except that none of the witnesses for the prosecution identified the murdered man as Robt Kain. They knew him simply as Kain and did not know his Christian name. The conviction was set aside.

In a case of larceny the indictment charged that the defendant stole a gray gelding. The proof went no further than to show that it was a gray horse. Conviction set aside.

In another case of horse stealing the indictment charged that the horse was the property of A. As a matter of fact, it was the property of A and B. Again the conviction was set aside.

An indictment charged one with suborning J. S. of W. to commit perjury. It was proven that J. S. lived at X. The conviction was set aside, though it would have been good if J. S.'s residence had not been mentioned.

An indictment for arson which failed to state the name of the occupant of the house burned was held insufficient to support a conviction, though the fact was fully brought out in evidence.

A conviction of larceny was set aside because the indictment, which alleged that the defendant stole certain property from A., did not allege that the property stolen belonged to A.

A conviction of robbery was recently set aside and a new trial granted in the criminal court of this county on the ground that the defendant had not been called upon to enter his plea before the first trial was begun. Astute counsel urged that therefore the defendant had not been given a fair and impartial trial—and it did not require quite three minutes of labored thought on this vital point to reveal its sufficiency to the trial judge.

In the recent case of Ryan, indicted for the murder of John T. Smith, when called for trial before Judge Windes, counsel for the defendant moved to quash the indictment for the reason that John T. Smith was not described therein as a "human being." Judge Windes, however, being either unlearned in precedents or else lacking reverence for hoary errors, granted the motion the scantest courtesy judicial etiquette would permit.

It might be well for the court to ask these clever legal contortionists, as Lord Russell asked Sir Edwin Clarke: "Do you contend then that common sense has nothing to do with your case?"—*Chicago Law Journal*.

**LEGAL EMERGENCIES.**

Although the processes of law are proverbially slow, there are many occasions when lawyers must act with promptness where a lack of promptness or knowledge of the law may result disastrously to the interests of their clients. This is notably the case in drawing of wills. It often happens that a lawyer is roused out of bed late at night to go to the bedside of a dying person and perfect a will disposing of large amounts of property. To do this with expedition, complying with all the requisite forms, while death is literally waiting at the door, is a task that requires a man of cool head and self-possession. Surrogates' courts bear testimony to the frequency with which the wishes of testators have failed to be carried out, because of the failure to comply with some almost trifling detail. In one case the lawyer was so slow in making out the paper that the testator died before the requisite formalities were complied with. In another case a quick-witted lawyer who saw that there was not time to complete a will in a case where the property consisted of money in bank, adopted the expedient of making out checks for the heirs, which were duly signed and acknowledged and the heirs got their money the next day, without being obliged to wait a year for executors.

In commercial crises lawyers have to do a good deal of quick work in putting business affairs in shape to meet an emergency. The bankrupt generally desires to save parts of the wreck for this or that creditor, or for relatives, or for himself; and the papers must be drawn in due form to elude the vigilance of the unfortunate creditors who got left. Bankruptcy business has become a special branch of law; and there are some lawyers who have become very expert at it, so that upon short notice and with brief time in which to work they can arrange the affairs of a bankrupt man so as to dispose of the assets according to the wishes of their clients.

There is room and need for quick wit in the actual trial of cases in court. It is one thing to prepare a case with careful considerations of the facts and due application to the law of these facts. It is quite another thing to be able to handle a case in open court under the spur of competition with sharp opposing counsel or a testy court. In every large law firm the work is divided like that in a factory, and to each is assigned a particular part of the case.

The one who tries it must be a man of rapid

judgment and resources. He must be able to meet surprises, to discern men, to divine hidden motives, to surmount the prejudices of jurors or judges, and to seize the advantages of the moment. There is no end of need for quick wit in questions of identity. In an extradition case, which depends entirely upon identity, the defendant had been fully identified. The defendant's counsel slyly got his client to change his coat in court with another man of similar appearance, and in a few minutes the witness was led easily to identify the wrong man.

A quick-witted and daring western lawyer once saved a guilty client from sure conviction on a charge of poisoning. It was proved that the poisoning had been done by means of certain cakes, a portion of which were produced in court. When the counsel for the prisoner had finished his speech, he said:

"And these, gentlemen of the jury, are some of the alleged poisoned cakes. We declare to you, gentlemen of the jury, that these are not poisoned cakes. They are as harmless cakes as ever were made, and in order, gentlemen of the jury, to show you that these cakes are not poisoned, I will eat one right here in your presence."

And he did eat one. He took good care however, to leave the room at the earliest opportunity and to make a bee line for an adjoining room, where he had an emetic in readiness and an antidote. But the jury never heard about the emetic or the antidote until the lawyer's client had been acquitted.

On another occasion a witness had been detailing with great minuteness certain conversation which had occurred several years before. Again and again the witness testified to names and dates and precise words, and it became necessary for his cross-examiner to break him up. This was done by a very simple device. While the witness was glibly rattling on his testimony, the cross-examiner handed him a law book and said:

"Read aloud a paragraph from that book!"

"What for?" inquired the witness.

"I will tell you after you have read it," said the lawyer; and the witness accordingly read a paragraph of most interesting matter about lands, appurtenances and hereditaments. Then the lawyer went on and asked him a few more questions about his memory, and the witness was positive that his memory was very good. Suddenly the lawyer said:

"By the way, will you please repeat that

paragraph you just read about lands, appurtenances and hereditaments?"

"Why, of course I could not do that," replied the witness.

"You must have a queer memory," retorted the lawyer, "since you can repeat things that you say occurred years ago, and you cannot repeat what you read a moment ago."

The witness was nonplussed, and the jury was obviously amused at his discomforture.

A quick-witted lawyer thinks on full gallop. Many successful cross-examiners have been men who could keep up a running fire of jokes and comments, and never lose sight of the main point, who could lead a witness along by suavity and politeness and acquiescence an apparent obsequious deference into pitfalls of contradiction. Such men will let a smart witness talk on until he drops some unfortunate expression that subjects him to being pounced upon and demolished at one fell swoop.

A leading counsel for the defendant in an accident damage case, where the injury had been occasioned by a jet of steam scalding the complainant's back and neck, as he was driving past the defendant's place, argued to the jury that the plaintiff was guilty of contributory negligence, and should have looked up to avoid the accident. The quick-witted counsel for the complainant retorted: "Oh, no, if he had looked up, instead of suing for damage to the back of our head, we should have to charge you for the loss of both eyes."

"In a trial for burglary the people's witness showed that he was on watch in the hall, when he heard some one fumbling with the lock of the door, and that he then slyly turned the knob so that the thief could come in easily. The glibbed-tongue lawyer for the prisoner said: "Why your honor, this witness was the real burglar, for it was he and not my client who really opened the door." The result of this timely remark was that the prisoner got off with a light sentence for an attempt at burglary.

A good deal of quick work is often required of lawyers in the filing of liens on real estate or other property, in cases where obligations are many and the assets few, and the first comer is the only one who gets service. A good deal of wit is often displayed in the method of making a levy. Benjamin F. Butler, when he was a young lawyer, got a wide reputation for sagacity by attaching the water-wheel of a mill in an action for debt. It used to be a common thing for lawyers obtain-

ing judgments against the city to attach the pictures, in the governor's room of the city hall.—*Nebraska Legal News.*

## SUPREME COURT PROCEEDINGS.

### New Cases.

New cases filed in the supreme court since October 28, 1896.

5290. William Becker v. Robert Hamilton. Error to the circuit court of Erie county. H. L. Peeke, for plaintiff.

5291. William Becker v. Frederick Myer. Error to the circuit court of Erie county. H. L. Peeke, for plaintiff. Hull & Guerin, for defendant.

5292. William Becker v. The Second National Bank, Sandusky, Ohio. Error to the circuit court of Erie county. H. L. Peeke, for plaintiff. Chas. L. Hubbard, for defendant.

5293. William Becker v. The Second National Bank, Sandusky, Ohio. Error to the circuit court of Erie county. H. L. Peeke, for plaintiff. Hull & Guerin, for defendant.

5294. The Good Templar Lakeside Bld. Co. v. W. M. Filabaunu et al. Error to the circuit court of Ottawa county. H. L. Peeke, for plaintiff. H. L. Peeke and S. P. Alexander, for defendants.

5295. Henry P. Folsom et al. v. John G. Haas and David Haas, Exrs. et al. Error to the circuit court of Pickaway county. Booth & Keating and H. P. Folsom, for plaintiffs.

5296. Edward Putnam et al. v. John P. Phillips, Admr. Error to the circuit court of Ross county. Archibald Mayo, for plaintiffs. W. E. Evans and John C. Entrekin, for defendant.

5297. Erasmis F. Aldrich et al. v. Isabel Endsley and Bd. of Comrs. of Defiance county. Error to the circuit court of Defiance county. Harris & Cameron and Hubbard & Hockman, for plaintiffs.

5298. Romulus Cotell v. The State of Ohio. Error to the circuit court of Summit county. Edwin F. Vokes and Harby Musser, for plaintiff. F. S. Monnett, Atty. General and R. M. Wannamaker, for defendant.

5299. The C., A. & C. Ry. Co. v. Frank Poynton, Admr. Error to the circuit court of Wayne county. Johnson & Taylor, for plaintiff.

5300. J. B. Ramsey v. John J. Lentz et al. Error to the circuit court of Franklin county. T. E. Powell and Daw Dumby, for plaintiff. J. J. Stoddard, and George K. Nash, for defendants.

5301. Thomas M. Stacy v. The State of Ohio. Error to the circuit court of Stark county. Alter Pomerene and Wm. R. Day, for plaintiff.

5302. The State of Ohio v. Joseph C. Hutchinson. Error to the circuit court of Franklin county. Joseph H. Dyer, F. S. Monnett, Atty. General, and Chas. Case, for plaintiff.

5303. The State of Ohio v. Joseph C. Hutchinson. Error to the circuit court of Franklin

county. Joseph H. Dyer, F. S. Monnett, Atty. General, and Chas. Case, for plaintiff.

5304. Elijah Hunt, Supervisor, et al. v. Jacob E. Nebs. Error to the circuit court of Franklin county. G. J. Marion, for plaintiffs. J. H. Vercoe, for defendant.

5305. William Franzer et al. v. Bernard Smith. Error to the circuit court of Marion county. Armstrong & Johnson, for plaintiffs. Le Bond, Langhudge and Schlosser, for defendant.

5306. Hattie M. Klump, Ex'r, v. John F. Klump, Ex'rs, et al. Error to the circuit court of Trumbull county. Tuttle & Pillius, for plaintiff. Taylor & Upton, for defendants.

5307. George W. Kendall v. James A. Cook. Error to the circuit court of Greene county. M. J. Hartley, for plaintiff.

5308. John Wall v. Thomas Wall and Reason Wall, Ex'rs. Error to the circuit court of Medina county. W. R. Talbot, for plaintiff. J. Andrew, for defendants.

5309. The Oil Well Supply Co. v. Thomas C. Kelly. Error to the circuit court of Hancock county. Cable, Parmenter & Doty, for plaintiff. George H. Phelps, for defendant.

5310. Charles F. Meyers v. Rodgers, McDonald & Company. Error to the circuit court of Franklin county. M. B. Earnhart, for plaintiff.

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## COMMENDATIONS.

The following selections give the pith of some of the many commendatory letters we have received from time to time. Want of space prevents our giving all the letters, and we submit these few as specimens of the whole.

A well known lawyer in northern Ohio writes:

"The Ohio Legal News, I believe is the best legal paper ever published in Ohio."

Another says:

"I have been a subscriber to all the other Ohio law papers published within the last thirty-five years, and am frank to say that yours is ahead of any one of them."

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A distinguished attorney in central Ohio writes:

"Allow me to congratulate you on the excellency of the Ohio Legal News. I consider it the best law journal in existence to-day."

A well known ex-judge, upon return to practice wrote:

"I have become in the habit of relying upon your Legal News to keep myself posted in the matter of current decisions, and items of news, while upon the bench, and I should be unable while in the practice to go ahead with proper assurance, if I did not subscribe for the News."

A retiring circuit court judge wrote us:

"You have not only set the pace for competitors, but made it so rapid that they do not appear to be in the race. I am unable to see how a lawyer can be without your paper."

Another member of the bench says:

"Containing as it does so many of the current decisions of interest not published elsewhere, it seems impossible that a lawyer who aims at success can permit himself to go without it."

Another writes:

"I like your plan of publishing the decisions. It will be a good thing to furnish the profession with the bound volumes as rapidly as completed. I like also the good fat volumes you are publishing."

Judge Baker, of the United States circuit court of Indianapolis, granted a restraining order against the American Wire Nail trust last week. In granting the order the judge said that the trust was a "monster that seeks to prey upon the whole American people, and which it is the duty of the courts and the law makers to come down upon with an unsparing hand."

The creditors of a fireman cannot by proceedings supplementary to execution reach the wages due him from a municipal corporation for services as such fireman. It is against public policy to permit such legal proceedings to intervene so as to prevent the payment to the fireman himself of the wages due him for services so rendered. *Sandwich Mfg. Co. v. Krake* (Minn.), 68 N. W. Rep., 606.

Beginning with the first day of the new oral assignment, on Wednesday of this week, the supreme court divided as contemplated by the recent act increasing the membership of the court to six.

Chief Justice Williams and Justices Minshall and Spear constitute the first division, and will sit for the hearing of oral arguments in the regular court room, Judge Williams presiding. Judge Burket will preside over division number two, consisting of himself and Justices Shauck and Bradbury. This division will sit for the hearing of oral arguments in the hall of the house of representatives.

### THE MOSGROVE LAW.

The constitutionality of the Mosgrove law, passed by our last legislature, regulating the granting of medical certificates to physicians by the state board of medical examination and registrations is to be tested.

The testing of its constitutionality will come as a result of a mandamus proceeding brought by Dr. W. A. France, to compel the board to grant him a certificate, the board having decided not to do so until his eligibility shall have been examined. The outcome of this case, which was argued in the Franklin common pleas court last Monday is being watched with great interest, as the law is one of great interest to every physician in the state, and has met with serious opposition from many doctors ever since its enactment.

Where a witness gives his opinion as an expert, based on the testimony of others, the assumed facts should be stated hypothetically in the question, and it is erroneous to permit a witness to be asked to state his opinion based on the recollections of the testimony of another witness. *Redfield Bell Ry. Co. v. Palmer* (Ind.), 44 N. W. Rep., 686.

Where the statute of a State provides that a "person of unsound mind, as an idiot, *non compos*, lunatic, monomaniac or distracted person," it was held in the case of *Young v. Miller* (Ind.), 44 N. E. Rep., 757, that a monomaniac is not necessarily incapacitated from making a will. It was further held that in a suit to set aside a will on the ground of mental incapacity, proof that testator was a monomaniac does not require defendant to show by a preponderance of evidence that the monomania did not affect the execution of the will, and that testator in fact possessed testamentary capacity; he is only required to adduce sufficient evidence to prevent the preponderance from being in favor of plaintiff.

### NEW JUDGES.

So far as we have been able to ascertain, the following are the judges elected on Nov. 3:

#### SUPREME COURT.

Marshall J. Williams, Washington C. H.

#### CIRCUIT COURTS.

Peter J. Swing, Batavia, 1st circuit.  
Harrison Wilson, Sidney, 2d circuit.  
Geo. R. Haynes, Toledo, 6th circuit.  
Jerome E. Burrows, Painesville, 7th circuit.  
Hugh J. Caldwell, Cleveland, 8th circuit.

#### COMMON PLEAS COURTS.

Linn W. Hull, Sandusky.  
S. A. Wildman, Norwalk.  
Jackson Barber, Toledo.  
F. E. Dellenbaugh, Cleveland.  
D. J. Nye, Elyria.  
James B. Kennedy, Youngstown.  
David Davis, Cincinnati.  
Ferd Jelke, Jr., Cincinnati.  
John P. Murphy, Cincinnati.  
Sam. W. Smith, Jr., Cincinnati.  
Fred Spiegel, Cincinnati.  
Bigger, Columbus.

**THE TORRENS LAW.**

The supreme court of Illinois, in an opinion filed last Monday, hold that the Torrens land title act of that state is unconstitutional.

The chief objection to the law as it exists in Illinois, is that in every case where the old system is to be abolished and the new one adopted, the county recorder is the official whose duty it is to pass upon the title of, the owner, which is in fact conferring judicial power upon the county recorder, which power should rest only in the courts. Such an objection as this does not exist in the law passed by our legislature last winter, for when the framers of our law came to this provision, they conferred this power of passing upon the title upon the probate or common pleas courts.

If an owner of lands desires to have them registered under our Torrens law, he must first go into court and prove that he has a clear title to it, and when he has satisfied the court of this, an order is made by the court directing the recorder to register the lands under the new system, while under the law as it exists in Illinois, proof of title must be made to the county recorder, so as to this objection the Ohio law will not be affected by the Illinois decision, but there may be other grounds upon which the decision is based, which may affect our law, as our law is very similar to that of Illinois.

**SUPREME COURT OF OHIO.**

January Term, A. D. 1896.

**CAUSES ASSIGNED FOR ORAL ARGUMENT.**

Wednesday, Nov. 11.

3544. Filmore Musser, auditor, et al. v. Mary O. Adair.

3545. Mark B. Wells, treasurer, v. Mary O. Adair.

3713. James L. Taylor, adm'r, v. Filmore Musser, auditor, et al.

4829. George P. Elliot, treasurer, v. Nelson Cummins, ex'r.

4927. The N. Y., P. & O. R. R. Co. et al. v. John McGovern.

Friday, Nov. 13.

5274. The State of Ohio v. Glen A. Emory.

3594. Oliver C. Shurtz, adm'r, v. James Colvin et al.

Wednesday, Nov. 18.

3637. Jane Clark et al. v. The Cleveland Refining Co.

3645. Bartholomew Lucy v. The Metropolitan Life Insurance Co.

Friday, Nov. 20.

3663. David R. Paige v. Albert Paige, assignee.

3680. The Standard Oil Co. v. George G. Snowden, assignee, et al.

Wednesday, Nov. 25.

3654. Eliza L. Joyce v. Frederick L. Dauntz et al.

3694. The B. & O. R. R. Co. v. Christian Lersch.

Friday, Nov. 27.

3690. The National Life Insurance Co. v. Blanche O. Brobst.

3705. The Pennsylvania Co. v. Stephen B. Sturges et al.

4124. The Pennsylvania Co. v. Stephen B. Sturges et al.

Wednesday, Dec. 2.

3754. Lillian Burnet et al. v. Mary M. Felt.

3773. Thomas H. Wells v. The Lawrence R. R. Co.

Friday, Dec. 4.

3520. The State of Ohio ex rel. Attorney General, v. The People's Industrial Fire Association of Cincinnati, O.

3791. The B. & O. S. W. R. R. Co. v. Charles Ault.

Wednesday, Dec. 9.

3813. John W. Bryant et al., ex'rs, v. The Liverpool, London and Globe Insurance Co.

3814. John W. Bryant et al., ex'rs, v. The Fireman's Insurance Co. of Dayton.

Friday, Dec. 11.

3798. Alfred J. Thomas v. John Koch, guardian.

3824. Lewis Fischer v. Julius Freiberg et al.

Wednesday, Dec. 16.

3827. Emma V. Ewan v. The Brooks Waterfield Co.

3834. R. Brinkerhoff, trustee, et al. v. Frederick Tracy, adm'r.

Friday, Dec. 18.

3853. Lewis W. Irwin, adm'r, v. C. A. Webster, treasurer.

3858. John H. Faley et al., ex'rs, v. Dina Leisy, ex'x.

**General Docket.**

Causes to and including No. 4568, on the general docket are called and marked submitted.

The next call will be to and including No. 4666.

3201. The State of Ohio ex rel. Attorney General v. Charles Abner et al. *Quo warranto*. Dismissed for want of prosecution.

3483. Augustus W. Ridgway et al. v. The Rio Grande College et al. Error to the circuit court of Gallia county. Judgment affirmed.

3584. George Miller v. George N. Weisenberger. Error to the circuit court of Defiance county. Judgment affirmed, it appearing one bound for reversal was that the verdict was

against the weight of the evidence; other questions not passed upon.

4391. Katherine Hoffman v. Anna Hanken et al. Error to the circuit court of Putnam county. Judgment affirmed.

4400. Nathan C. West v. The Norwalk National Bank. Error to the circuit court of Sandusky county. Judgment affirmed on the authority of Beninger v. Hess, 11 Ohio St. 64.

4418. May Olinger v. William W. McGuffey et al. Error to the circuit court of Franklin county. Judgment reversed upon grounds stated in K. Journal entry.

4438. Delilah F. Kelly v. William Barnett et al. Error to the circuit court of Columbiana county. Judgment affirmed.

4460. C. Dieringer v. Lipman Levy. Error to the circuit court of Hamilton county. Dismissed by consent of parties at costs of plaintiff in error.

4466. Emile Werk v. W. H. Christie. Error to the circuit court of Hamilton county. Dismissed by consent of parties at costs of plaintiff in error.

4466. Emile Werk v. John S. Bishop et al. Error to the circuit court of Hamilton county. Dismissed by consent of parties at costs of plaintiff in error.

4566. James Jackson v. James P. Seward et al. Error to the circuit court of Richland county. Dismissed by consent at costs of plaintiff in error.

4712. Anna P. Trimble v. The City of Columbus et al. Error to the circuit court of Franklin county. Settled and dismissed at costs of defendants in error.

The following causes on the general docket have been dismissed for failure to file printed record:

5120. The T. & O. C. Ry. Co. v. James W. Wickenden. Error to the circuit court of Lucas county.

5213. John C. Given, receiver, et al. v. Frank McKinney. Error to the circuit court of Stark county.

5214. Jacob P. Faucett, receiver, et al. v. Frank McKinney. Error to the circuit court of Stark county.

The following causes on the general docket have been dismissed for want of preparation:

4459. Orlando Volkmere, admr., v. Alice Henden et al. Error to the circuit court of Stark county.

4485. Francis L. Hartman et al. v. Samuel A. Hunter, treas. Error to the circuit court of Lucas county.

4503. The Lawrence Furnace Co., v. Trustees of original surveyed township, 2, R. 18. Error to the circuit court of Lawrence county.

4515. Francis C. Russell v. Leander O. Smith. Error to the circuit court of Meigs county.

4521. Adam Becker et al. v. The City of Columbus. Error to the circuit court of Franklin county.

4522. George B. Cass v. Blütha C. Warden et al. Error to the circuit court of Putnam county.

4523. Thomas J. Maple v. John H. Kunneke. Error to the circuit court of Putnam county.

4530. William Waller v. the Portsmouth National Bank. Error to the circuit court of Scioto county.

4533. John Crow et al. v. John T. Kent et al. Error to the circuit court of Harrison county.

4534. Henry Trentman v. The Board of Commissioners, Allen county, et al. Error to the circuit court of Allen county.

4535. Biola A. Casler et al. v. Elizabeth H. Bowen. Error to the circuit court of Cuyahoga county.

4536. Stephen F. Dawson, treasurer, v. William Morrison. Error to the circuit court of Coshocton county.

4537. Thomas Graham et al. v. The Board of Commissioners, Holmes county, et al. Error to the circuit court of Holmes county.

4544. Andrew Campbell v. Katie Ann. Error to the circuit court of Brown county.

4546. Mary G. Caldwell v. The City of Columbus et al. Error to the circuit court of Franklin county.

4550. The C. W. & M. V. R. Co. v. David Martin. Error to the circuit court of Medina county.

4552. Mary S. Black et al. v. William Heatt et al. Error to the circuit court of Hamilton county.

4553. John G. Hower et al. v. J. E. Williams. Error to the circuit court of Cuyahoga county.

4554. Mark Richardson v. Robert H. Jenks et al. Error to the circuit court of Cuyahoga county.

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## COMMENDATIONS.

The following selections give the pith of some of the many commendatory letters we have received from time to time. Want of space prevents our giving all the letters, and we submit these few as specimens of the whole.

A well known lawyer in northern Ohio writes:

"The Ohio Legal News, I believe is the best legal paper ever published in Ohio."

Another says:

"I have been a subscriber to all the other Ohio law papers published within the last thirty-five years, and am frank to say that yours is ahead of any one of them."

A leading member of the Cincinnati bar says:

"You have made hustling times with your competitor, and although you have made him improve his paper considerably, it is yet far behind yours."

An attorney of prominence at Columbus says:

"I learn that your journal is regarded by the legal profession as the leading one, and as I desire to keep up with the procession, so I send you my subscription."

A distinguished attorney in central Ohio writes:

"Allow me to congratulate you on the excellency of the Ohio Legal News. I consider it the best law journal in existence to-day."

A well known ex-judge, upon return to practice wrote:

"I have become in the habit of relying upon your Legal News to keep myself posted in the matter of current decisions, and items of news, while upon the bench, and I should be unable while in the practice to go ahead with proper assurance, if I did not subscribe for the News."

A retiring circuit court judge wrote us:

"You have not only set the pace for competitors, but made it so rapid that they do not appear to be in the race. I am unable to see how a lawyer can be without your paper."

Another member of the bench says:

"Containing as it does so many of the current decisions of interest not published elsewhere, it seems impossible that a lawyer who aims at success can permit himself to go without it."

Another writes:

"I like your plan of publishing the decision. It will be a good thing to furnish the profession with the bound volumes as rapidly as completed. I like also the good fat volumes you are publishing."

Judge Joseph M. Woods, of Athens, has been appointed by Governor Bushnell to fill the vacancy on the common pleas bench in the third subdivision of the seventh judicial district, caused by the death of Judge De Steigner recently. Judge Woods is the judge elect at the recent election.

John D. Gallagher, a prominent attorney of Cincinnati, died at his home in that city last week, Tuesday. He was a well read and painstaking attorney who threw his whole strength into his work, finally bringing on nervous disorders which terminated in his death. He served for one term as Assistant City Solicitor, and at the time of his death was a member of the law partnership of Coppock and Gallagher.

The noted libel case of Tyndale Palmer, of New York, against the Youngstown *Telegram*, was decided in the common pleas court of Mahoning county, last week, and the plaintiff was awarded damages in the sum of \$1,350. The action grew out of the publication of an article in which Palmer was charged with dishonest dealings in certain business enterprises in Brazil, and is one of about 250 cases instituted by Mr. Palmer, against various newspapers in this country, and should Mr. Palmer be as successful in the remaining 249 cases as he was in the first one, he will have a sufficient sum on hand to build up his good character which had thus been trampled upon regardless of consequences.

The constitutionality of the Garfield law is liable to be called into question and there is some doubt in the minds of lawyers as to whether it will stand the test of the courts. A case is likely to be brought from Vinton county where it is understood the defeated democratic nominees will bring an action on the ground that their republican rivals overstepped the provisions of the law in the spending of money. While this would not of itself be a direct proceeding against the constitutionality of the law, yet the latter would be called into question and passed upon. The law is one carefully prepared and eminently fair in its provisions, but it is claimed, however, that discrepancies occur which are of a nature which could not be avoided and yet which, if put under the eye of the court might throw the law out.

In the case of *Gentile, Admr., v. The Cincinnati St. Ry. Co.*, decided by the superior court of Cincinnati in general term, Judge Smith delivering the opinion. *Held*, that where, in an action to recover damages for wrongfully causing death by negligence and the jury return a verdict for plaintiff, necessarily finding that the death resulted from the negligence of the defendant, and that the plaintiff was free from contributory negligence a reviewing court will not consider assignments of error based upon the conclusion of testimony offered by the plaintiff tending to show negligence upon the part of the defendant. Such error, even if found to exist, would not be prejudicial to the party complaining, and further that an action for damages to recover for wrongfully causing death is an action for injury to the person and therefore by reason of the provisions of section 5306, Revised Statutes, a court has no power to give a new trial on the ground of the smallness of the damages.

The United States supreme court has just rendered an opinion of great importance in confirming the judgment of \$5,000 secured by Miss Harriet Monroe, of Chicago against the *New York World*. This decision should act as a lesson in honesty to some of the dishonest newspapers of the country.

It will be remembered that Miss Monroe was selected to write the ode upon the World's Columbian Exposition, and after the ode had been composed by her it was put in type and proof slips were sent to the newspapers of the country, which was done as a matter of courtesy, to be published by such newspapers after its reading by the author. The *World* violated the conditions regarding the publication of the ode, printing it not only before it had been read, but in a condensed form which changed its meaning and destroyed the beauty of its composition. Miss Monroe sued for \$5,000, and after a long and tedious fight she has won, and her rights have been vindicated. It is a common practice with a great many unscrupulous newspapers to secure and print public documents and speeches in advance of their delivery, but this can never be done without violating the terms of an agreement or a resort to dishonest methods of some kind, and the judgment against the *World* will be a punishment for its dishonesty and its violation of the courtesy of the World's Fair committee, which sent the proof sheets to the newspapers throughout the country.

In the case of *Crane & Co. v. Standard Life & Accident Ins. Co.*, decided by the superior court of Cincinnati in general term, Judge Hunt in delivering his opinion, *held*, that the word "immediate," when used in reference to the notice in writing to be given of an accident, injury or claim under a policy of insurance, means within a reasonable time considering the circumstances of each case, and ordinarily the question is one to be determined by the jury under proper instructions from the court.

### BREVITY OF JUDICIAL OPINIONS.

The brevity of old law reports is praised by an English law lecturer, who laments the tedious length of many modern cases. But the "London Law Journal" contends that the charge of verbosity against the English judges of to-day is not justly made except against those of the chancery division and one or two others. In this country we have all kinds. A few judges write so briefly that they sometimes omit mention of important facts. But there are very few of this kind. More judges are great sinners against brevity. But the majority of our judges usually keep from either extreme. The cases are indeed rare in which the whole situation, both as to facts and the contentions, does not clearly appear in the opinion of the court. Constant use and examination of a multitude of opinions from all the jurisdictions in this country will impress one with the very high average of the judicial opinions, at least in the matter of clearly presenting the question involved. Their average length may be somewhat too great, but it is not greatly excessive.

The greatest criticism that can be made upon the length of opinions handed down by our courts should be aimed at the needless inclusion of unimportant matters. Few lawyers if any, will criticise a judge for the length of his discussion of law questions, at least when it includes a review and analysis of the legal authorities thereon. But lawyers may well complain when their burden of expense for law reports is needlessly enlarged by swelling volumes with worthless matter. That detailed statements of facts are worthless to the profession, except so far as they need to be stated to make the law questions clear, is hardly to be disputed. Yet now and then opinions are found which for page after page repeat all the verbosity of the pleadings and the testimony. In some cases, doubtless,

the judge goes into these matters with unnecessary particularity in order to show that he has done full justice to the parties on the facts of the case. But has a judge any right to inflict this rubbish on all who have to buy his reports without any other reason than the satisfaction of the parties to that case? Is it not an absurdity and a wrong to print as a part of the opinion of the court the whole undigested record sent up on appeal? Yet this or something very like it is sometimes done. In the reports of a very few states it is hardly an exception. The effect is to becloud what there may be otherwise of excellence in the opinion and to create a presumption against the intellectual quality of the writer. Yet sometimes such opinions are written by very able men whose ability is in other ways incontestably demonstrated by these same opinions. If they would stop to consider more carefully the question, what they ought to include in their opinions, the result would be good.—*Case and Comment.*

### SPECIAL ASSESSMENTS FOR STREET IMPROVEMENTS IN OHIO.

Special assessments levied for the purpose of defraying the expenses of street improvements are authorized by statutes.

Sections 2263 and 2264, as amended, state what improvements may now be made and paid for by special assessments. Section 2263 reads as follows:

"When the corporation appropriates or otherwise acquires lots or lands for the purpose of laying off, opening, extending, straightening or widening a street, alley or other public highway, or is possessed of property which it desires to improve for street purposes, the council may assess the cost and expenses of such appropriation or acquisition, and of the improvement, or of either, or of any part of either, upon the general tax list, in which case the same shall be assessed upon all the taxable real and personal property in the corporation."

This section of the Revised Statutes of Ohio was enacted April 13, 1888, and can be found in the 85th volume of Ohio Laws, beginning on page 229 thereof.

Section 2264 of the Revised Statutes of Ohio, as amended May 21, 1894, states also how the cost of the improvements which it permits shall be assessed, when said cost is to be paid by special assessments. The parts of said section relating thereto are as follows:

"In the cases provided for in the last section, and in all cases where an improvement of any kind is made, except in cities of the second grade of the first class, of an existing street, alley or other public highway, the council may decline to assess the costs and expenses in the last section mentioned, or any part thereof, or the costs and expenses, or any part thereof, of such improvement, except as hereinafter mentioned, on the general tax list, in which event such costs and expenses, or any part thereof which may not be so assessed on the general tax list, shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, either in proportion to the benefit which may result from the improvement, or according to the value of the property assessed or by the foot front of the property bounding and abutting upon the improvement, as the council by ordinance, setting forth specifically the lots and lands to be assessed, may determine before the improvement is made, and in the manner and subject to the restriction herein contained. \* \* \*

Said section, as amended, is found in volume 91 of Ohio Laws, beginning on page 422. Said section, it will be seen, excepts cities of the second grade of the first class, namely, Cleveland.

Section 2264a of the Revised Statutes of Ohio, as amended April 21, 1890, and found in volume 92 of Ohio Laws, beginning on page 270 thereof, contains similar provisions for Cleveland and other corporations in Cuyahoga county. It is the purpose of this paper to outline the decisions bearing upon the provisions of the sections before stated.

The investigation will be limited to the consideration of the constitutionality of special assessments, and the manner of levying the same.

First. Is the levying of special assessments unconstitutional?

This involves the determination of four questions:

What is the nature of special assessments?

From what source is the power to levy the same derived?

Does the levying the same contravene section 19 of article 1, of the constitution?

Does it contravene section 2 of article 12, of the constitution?

The nature of special assessments.

Special assessments are a species of taxation.

They are to be distinguished from eminent domain, and from taxation proper.

The case of *Bonsall v. The Town of Lebanon*, 19 Ohio, 418, has been cited, approved and followed by a large number of later cases, and has never been reversed.

The question raised, was whether a special assessment for the cost of paving and curbing a sidewalk constructed by the town, after the property owner failed to do the same, having been properly notified to do so, could be collected. It was claimed that the same was a special or disseminating tax. Held, that it was not a special tax, but a tax upon an individual who failed to perform a general duty; that it was a sentence upon him.

*Scovill v. City of Cleveland and others*, 1 O. S., 126, cites and approves *Bonsall v. Lebanon*, *supra*, and itself has been frequently approved and followed.

The opinion was delivered by Judge Ranney, and discusses the question of special assessments. He therein distinguishes between eminent domain and taxation, defining each. He says, p. 135: "The right of eminent domain and the right of taxation, both alike involve the right to tax private property, and in both compensation is made or is supposed to be made. In the first case it must be made in money by the positive requirements of the section first recited, and if this assessment falls under that division it cannot be sustained. In the case of taxation, the tax payer is supposed to receive his just compensation in the protection which government affords to his life, liberty and property, and in the increase of the value of his possessions by the use to which the government applies the money raised by the tax."

He quotes the language of Mr. Justice Rugles, in the case of *The People v. Mayor, etc. of Brooklyn*, 4 Comstock, 422, as follows:

#### TAXATION.

"Taxation exacts money or services from individuals, as and for their respective shares of contribution to any public burthen."

"Taxation operates upon a community or upon a class of persons in a community, and by some rule of apportionment."

#### EMINENT DOMAIN.

"Private property taken for public use by right of eminent domain, is taken not as the owner's share of contribution to a public burthen, but as so much beyond his share."

'Special compensation is therefore to be made in the latter case, because the govern-

ment is a debtor for the property so taken; but not in the former, because the payment of taxes creates no obligation to repay, otherwise, than in the proper application of the tax."

"The exercise of the right of eminent domain operates upon an individual, and without reference to the amount, or value exacted from by any other individual or class of individuals."

Judge Ranney further says: "The assessment belongs to the taxing power," p. 136.

The case of *Hill v. Higdon*, 5 O. S., 243, fully discusses the constitutionality of special assessments under our present constitution, is one of the leading cases on this subject, is authoritative, and generally followed.

Judge Ranney delivered the opinion, cites and approves *Bonsall v. Lebanon* and *Scovill v. City of Cleveland*, *supra*, and distinguishes between taxes in general and assessments. His language is as follows:

"The popular as well as legal signification of this term" (meaning assessment) "had always indicated those special and local impositions upon property in the immediate vicinity of an improved street, which were necessary to pay for the improvement, and laid with reference to the special benefit which such property derived from the expenditure of the money. They had always differed widely from the ordinary levies made for the purposes of general revenue," p. 247, and again on p. 248. "That where taxation is spoken of in the 2d section of the 12th article, reference is made to the general burdens imposed for the purpose of supporting the government and the revenue raised expended for the equal benefit of the public at large; while the power of assessment referred to in the 6th section of the 13th article, although resting upon the taxing power, was intended to describe a distinct and well known mode of laying a local burden upon particular property, with reference to the peculiar and special benefit derived to such property from the expenditure of the money."

He also shows where section 6, article 13, of our present constitution was obtained.

"The language of this section furnishes very strong evidence that the convention carefully discriminated between taxation and assessment; and regarded them as distinct modes of raising money for different purposes, and upon different principles; from the fact that both terms are employed and both are required to be restricted when used by cities and villages. The origin and history of the

section lead to the same conclusion. It is almost a literal copy of the 9th section of the 8th article of the constitution of the state of New York," p. 248. *Reeves v. Wood Co.*, 8 O. S., 333, is to the same effect.

See also *Ernst v. Kunkle*, 5 O. S., 520; *Northern Indiana Railroad Co. v. Connelly*, 10 O. S., 159; *Creighton v. Scott*, 14 O. S., 438; and *Gist v. Cincinnati*, 26 O. S., 275. See also *Lima v. Cemetery Association*, 42 O. S., 128, which cites and follows *Hill v. Higdon*, *supra*.

From what source is the power to levy special assessments derived?

The power to authorize assessments for the improvement of streets by cities and villages, is included within the general grant by the constitution of legislative power to the general assembly, that is, is authorized by article 2, section 1, of our present constitution, and is not derived from article 13, section 6.

"The latter does not contain nor is it intended to express any grant of the power of assessment. It merely mentions the power of assessment as an existing power and does this simply in a mandate, upon the legislature to restrict its exercise, and provide against its abuse by cities and villages."

*Reeves v. Wood Co.*, 8 O. S., 333, see p. 339, see also *Hill v. Higdon*, *supra*, and other Ohio state cases before cited.

Does the levying of assessments contravene section 19, of article 1, of the constitution?

Section 19, of article 1, of the constitution of 1851, provides for the inviolability of private property; that private property cannot be taken by the public unless compensation therefor shall be first made in money. Article 8, section 4, of our first constitution, that of 1802, is to the same effect.

*Bonsall v. State* and *Scovill v. City of Cleveland*, *supra*, decide that levying assessments is not forbidden by article 8, section 4, of the constitution of 1802; and *Hill v. Higdon*, and *Reeves v. Wood Co.*, *supra*, that it is not prevented by article 1, section 19, of the constitution of 1851, for the reason that assessments are a species of taxation, belong to the taxing power of the legislature, and therefore are not within the purview of that part of the constitution which forbids the taking of private property for public purposes, and do not belong to the eminent domain power of the legislature.

Does the levying of assessments contravene sections 2, of article 12, of our constitution? Section 2, of article 12 of the constitution provides for taxation by uniform rule.

*Hill v. Higdon and Reeves v. Wood Co.*, *supra*, decide that levying assessments is not in contravention of article 12, section 2, of the constitution of 1851, for the reason that assessments, while of the nature of taxes, and authorized by the power given to the legislature to levy taxes, are distinguished from taxation proper, a distinction which is recognized by section 6, of article 13, of the constitution, which provides for the restriction of the legislative power of taxation, assessment, etc.

See also *Ernst v. Kunkle*; *Northern Indiana Railroad Co. v. Connelly*; *Creighton v. Scott*, and *Gest v. Cincinnati*, *supra*.

Second. The manner of levying assessments.

There are three ways of making the assessment permitted, any one of which may be followed. Upon the abutting and such adjacent and contiguous or other lots and lands as are benefited, according to the value of the property assessed; or,

Upon the property bounding and abutting upon the improvement, according to the foot front; or,

Upon the abutting and such adjacent and contiguous or other lots and lands as are benefited, in proportion to the benefits which may result from the improvement.

The following questions under this head will be considered:

What is the reason for the theory upon which assessments are levied?

What are the essentials of assessments?

Upon what property may they be laid?

What are the rules for levying the same?

The reason for paying for improvements by special assessment is that because of the improvement certain property has been specially benefited, and therefore, that property which has been so specially benefited should pay for the same.

*Scovill v. Cleveland*, *supra*, p. 132.

Judge Ranney says:

"The tax is upon land alone, and is imposed upon the principle of charging each particular tract with its just proportion, according to the benefit specially accruing to it from the improvement. The owner is not taxed because of its general convenience, but because his land is specially enhanced in value."

*Hill v. Higdon*, *supra*, p. 247.

Judge Ranney says:

"The popular as well as legal signification of this term had always indicated those special and local impositions upon property in the

immediate vicinity of an improved street which were necessary to pay for the improvement, and laid with reference to the special benefit which such property derived from the expenditure of the money."

*Reeves v. Treasurer of Wood county*, *supra*, p. 338. Judge Brinkerhoff adopts the language of Judge Ranney, above given.

*Northern Indiana R. R. Co. v. Connelly*, *supra*, p. 165, Judge Peck says:

"Assessments, as distinguished from general taxation, rest solely upon the idea of equivalents, a compensation proportioned to the special benefits derived from the improvement."

*Douglass v. City of Cincinnati*, 29 O. S., 165 Judge White, p. 167, says:

"The theory on which assessments are authorized is the presumed benefit resulting to the property from the improvement."

*Meissner v. Toledo*, 31 O. S., 387, Judge McIlvaine on p. 393, says:

"We find the scheme developed in the code to be in fact what all systems of special assessments must be in theory, namely, an imposition of public burdens arising from local improvements upon the property specially benefited by the improvements in proportion to the benefits resulting to the property."

*Chamberlain v. Cleveland*, 34 O. S., 551, Judge Gilmore, on p. 561, says:

"The right of a municipal corporation to assess private property to pay for a local public improvement is not founded on necessity but on a principle of justice, by which the public may take from an individual whose lands, owing to their proximity to it, are specially benefited by the improvement. . . ."

*Lima v. Cemetery Association*, 42 O. S., 128, Judge Okey, on p. 130, adopts the language of Judge Ranney in *Hill v. Higdon*, *supra*.

See also *Raymond v. Cleveland*, 42 O. S., 522,

What are the essentials of assessments?

The property assessed must be benefited.

This follows from the reason for special assessments.

See cases thereunder cited.

But the fact that one or more of the tracts assessed has not been benefited by the improvement does not invalidate the assessment.

*Northern Indiana R. R. Co. v. Connelly*, 10 O. S., 159, *supra*. Judge Peck, pp. 165 and 166, says:

"It is quite true that the right to impose such special taxes, is based upon a presumed equivalent; but it by no means follows that

there must be in fact such full equivalent in every instance, or that its absence will render the assessment invalid. . . . It is manifest that the actual benefits resulting from the improvement, may be as various almost as the number of the owners and the uses to which the property may be applied. No general rule, therefore, could be laid down which would do equal and exact justice to all. The legislature have not attempted so vain a thing, but have prescribed two (now three) "different modes in which the assessment may be made, and left the city authorities free to adopt either. The mode adopted by the council becomes the statutory equivalent for the benefits conferred, although in fact the burden imposed may greatly preponderate. In such case, if no fraud intervene, and the assessment does not substantially exhaust the owner's interest in the land, his remedy would seem to be, to procure, by a timely appeal to the city authorities, a reduction of the special assessment and its imposition, in whole or in part, upon the public at large."

*Creighton v. Scott*, 14 O. S., 438, follows *Indiana R. R. v. Connelly*, *supra*.

There must be a taxing district in order to levy a special assessment.

*Raymond v. Cleveland*, 42 O. S., 522. This was a case construing the statutes governing local assessments before amended so as to necessitate the designation of the specific property to be assessed, as is now required. This designation creates the taxing district.

Judge Okey, pp. 527 and 528, says: "No doubt a taxing district is essential to a valid assessment. Cooley's Taxation, 170. But when regard is had to the true definition of an assessment for street purposes, namely: '(quoting Judge Ranney's definition in *Hill v. Higdon*, *supra*)'; to the language of the statute already quoted, granting the power to assess, and confining it to 'lots and lands that are contiguous and adjacent' and 'those that abut upon' the improvement; we have no doubt that the statutory provisions quoted are in harmony with the constitution. To be sure, they are liable to great abuse, and the legislature, in view of that fact, has changed the law, so that now the specific property to be assessed must be designated before the improvement is made. Rev. St., § 2264."

Upon what property may it be imposed?

It may be assessed upon land appropriated by a railroad company for its track through a city and crossing the improved street at right angles, even though the track was constructed

after the work had been completed. *Northern Indiana R. R. Co. v. Connelly*, *supra*.

It may be assessed as has been seen upon bounding and abutting property.

What is bounding and abutting property within the meaning of the statutes authorizing assessments?

When part of a street is improved, bounding and abutting property, means only the property bounding upon the part improved, not upon any other part of that street, and a part of a street can be improved without improving the remainder of the street; but the property abutting on the part not improved, can not be assessed unless the assessment is made according to benefits, when it is assessed as adjacent and contiguous, not as bounding and abutting property. *Scovill v. Cleveland*, *supra*.

Judge Ranney, p. 133, says: "If the council have power under the general words, 'any street,' etc., in the first clause of the section to improve a part of a street, as appears to be conceded, it seems to us clear that the words in the next clause, 'grounds bounding and abutting on such street,' confine the assessment to ground on the part of the street improved. If part only can be lawfully improved, that part only can be lawfully taxed; and this, we are satisfied, is the true meaning of the law."

*Northern Indiana R. R. Co. v. Connelly*, *supra*, Judge Peck, pp. 163, 164, quotes and adopts the language of Judge Ranney, *supra*.

*Creighton v. Scott*, *supra*, Judge White pp. 411, 442, quotes and adopts the same language. *Cincinnati v. Batsche et al*, 52 O. S., 324.

"The assessment will be held valid and binding only as to such lots and lands as bound and abut on the improvement." Second section of syllabus, *ib*.

"The improvement within the statutory meaning, has reference to the specific thing of definite location, which is done or added to the street whereby it is improved. The term is not to be applied indiscriminately to any part of the street because it may have been improved in the sense of having been benefited by a change or addition made elsewhere on the street." Third section of syllabus, *ib*.

"Where a strip of ground from one side of a street, is appropriated for the purpose of widening such street, the lots and lands fronting on the opposite side of the street at the part widened, will be held to abut on the improvement, although the street may intervene between the abutting lots and lands and the strip of ground appropriated." Section 4 of syllabus, *ib*.

*Douglass v. City of Cincinnati*, 165, Judge White pp. 167 and 168 says: "What constitutes abutting property is to be determined by the situation of the property at the time of the passage of the ordinance directing the improvement and prescribing the mode in which it is to be paid for."

*Barney v. City of Dayton*, 1 O. D., 540.

See to the same effect, *Cincinnati v. Seasongood*, 46 O. S., 296.

"Bound is synonymous with limit or border. Abut means the same as bound—that is, to terminate or border; to be contiguous; to meet."

Lots and lands, adjacent and contiguous, may be assessed.

What are contiguous and adjacent lots and lands.

*Meissner v. Toledo*, 31 C. S., 387.

Judge McIlvaine pp. 395 and 396 says:

"That they are other than abutting lots and lands is perfectly clear from the context. The meanings of these words, 'especially adjacent' cannot be limited by any absolute or fixed measurement, but, in each case, must be determined by the circumstances; yet, for all practical purposes they may be said to embrace lots and lands 'near to' the improvement."

"An incorporated cemetery association is not relieved from an assessment for a street improvement by a statutory provision exempting its land from taxation, such exemption being regarded as confined to taxes as distinguished from local assessments."

Third section syllabus of *Lima v. Cemetery Association* 42 O. S., 128.

School property is not liable to assessment for a street improvement.

*City of Toledo v. Board of Education*, 48 O. S., 83.

What rules govern the levying of special or local assessments?

The rules applicable to all the modes of assessment will first be stated.

Second, when the assessment is made according to benefits.

Third, when the assessment is made by the foot front or according to value of the property assessed.

A municipal corporation having through its proper boards and officers, passed a resolution and ordinance to improve a street, in its assessment of the cost and expense of the improvement, it should be governed by the law in force at the time of the passage of its improvement ordinance, with respect to the

manner of assessment and the rights and liabilities of the owners of the property assessed.

*Cincinnati v. Seasongood*, 48 O. S., 296.

The value of the lot or land *with the improvements*, as assessed for taxation, is to be taken in determining the limit to which it may be assessed for the improvement of a street.

*Findlay v. Frey*, 51 O. S. 390.

Second, when the assessment is made according to benefits, "to enable a municipal corporation to pay for a local public improvement it may, by assessment, take from an individual whose lands are subject to assessment and specially benefited by the improvement, such a portion of the costs thereof as is the equivalent, but not in excess of the special benefits conferred thereby."

"The whole amount of the assessment must be apportioned amongst the several lots and parcels of land specially benefited, in the proportion that the special benefit to each lot or parcel bears to the whole special benefits conferred by the improvements." First and second syllabus of *Chamberlain v. City of Cleveland*, 34 O. S., 551.

Third, when the assessment is made by the foot front or according to value of the property assessed.

The assessment must be uniform.

*Northern Indiana R. R. Co. v. Connelly*, 10 O. S. 159 *supra*, Judge Peck, p. 165, says:

"The rule of apportionment, whether by the front foot or a percentage upon the assessed valuation, must be uniform, affecting all the owners and all the property abutting on the street alike. One rule cannot be applied to one owner and a different rule to another owner."

*Creighton v. Scott*, 14 O. S., 431 *supra*, Judge White, p. 440, says:

"The law prescribes the rule of uniformity for the imposition of the charge, as well as the extent of its operation."

See to same effect, *Jeager v. Brice*, 36 O. S. 164.

But where a street is of different widths, it may, in a proceeding to improve it, be divided into as many sections as there are different widths; and the property on each section assessed for the cost of the same.

See *Findlay v. Frey*, 51 O. S., 390, 3d section of the syllabus.

#### CORNER LOTS.

"In assessing the cost of a street improvement on abutting property by the front foot, regard must be had to what is the real front of the property. This is a question of fact, to be

determined by the manner in which it was laid out, or in which it has been built upon, and used and occupied by the owner."

"If a lot abuts lengthwise on the improvement, but fronts breadthwise on another street and not on the improvement, the lot should be deemed as fronting breadthwise on the improvement, and be assessed for the number of feet on the improvement that it would have in such case, and no more."

*Haviland v. Columbus*, 60 O. S., 471.

SHERMAN GRANGER.

Zanesville, O.

Nov. 13, '96.

### SUPREME COURT PROCEEDINGS.

COLUMBUS, O., November 17, 1896.

#### General Docket.

3552. *Emma C. Thornton v. A. Stanley et al.* Error to the circuit court of Hamilton county.

MINSHALL, J.

Where a testator bequeathed all the net income of his estate to a trustee in trust for the education and support of a certain person for life, without other limitation: Held, that the bequest so made is an absolute one, and is subject to the claim of creditors.

Judgment affirmed.

4121. *William T. Hale v. The State.* Error to the circuit court of Jackson county.

SHAUCK, J.

1. The general assembly is without authority to abridge the power of a court created by the constitution to punish contempts summarily, such power being inherent and necessarily to the exercise of judicial functions; and sections 6906 and 6907, Revised Statutes, will not be so construed as to impute to the general assembly an intention to abridge such power.

2. Removing a witness from the county of his residence where he was under subpoena to attend upon the trial of a cause pending, with the purpose and effect of preventing his appearance upon the day of trial, being a wrongful act which obstructs the administration of justice, is a contempt of court. *Baldwin v. The State*, 11 Ohio St., 681, overruled.

Judgment affirmed.

MINSHALL, J. dissents.

4754. *The Cincinnati, Hamilton & Dayton R. R. Co. v. The Village of Bowling Green.* Error to the circuit court of Wood county.

BRADBURY, J.

1. Where a railroad company is operating a railroad, the track of which extends within the limits of any incorporated city or village in this state, such city or village is authorized by section 2494 Revised Statutes, to require such railroad company to light that part of its track which lies within the corporate limits, although the company so operating such railroad is neither the owner nor the lessee thereof.

2. The city or village has authority in such case to prescribe the kind of light that shall be employed for that purpose.

3. Where in such case an electric light plant is in operation within such city or village, lighting its streets and furnishing light to its inhabitants, an ordinance is not unreasonable because it requires a railroad company to use in lighting its track the particular kind of lamp and illuminating material, in use for lighting the streets of such city or village.

4. An ordinance prescribing that "the number of hours that said electric lights shall be required to be lighted during each period of twenty-four hours shall be the same as the said council does now, or may hereafter, require for electric lamps within the limits of said village for lighting streets, shall be lighted," is sufficiently definite to advise the railroad company of what it is required to do.

5. An electric light company, owning an electric plant, and engaged in furnishing light to the inhabitants of a city or village, and in lighting the streets thereof, has so far devoted its property to a public use, that it is bound to furnish light within such city or village impartially to all applicants at a reasonable price.

Judgment affirmed.

4865. *The Toledo Commercial Company v. The Glen Manufacturing Company.* Error to the circuit court of Lucas county.

SPEAR, J.

The act of May, 19, 1894 (91 Ohio Laws, 355-6), which provides "that no foreign stock corporation, other than a banking and insurance corporation, shall do business in this state without first having procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in the state," etc., and that no such "corporation doing business in this state without such certificate, shall maintain any action in this state upon any contract made by it in this state until it shall have procured such certificate," etc., does not apply to a foreign corporation whose business within the state consists merely of selling through traveling agents, and delivering goods manufactured outside of the state.

Judgment affirmed.

5268. *The State of Ohio ex rel. Warner M. Bateman et al. v. August H. Bode et al.*

In mandamus.

BURKETT, J.

The act of April 17, 1896, 92 O. L., 185, which prohibits the name of any candidate for office from being placed upon the official ballot more than once, is a valid law.

Writ refused.

4380. *The Wheeling, Lake Erie & Pittsburgh Coal Company v. The First National Bank of Smithfield.* Error to the circuit court of Jefferson county.

WILLIAMS, C., J.

1. Statutory provisions prescribing the order to be observed by an officer in subjecting the debtor's property to sale on a writ of execution, are directory in their nature and for the

benefit of the debtor, who may waive strict compliance therewith, and such waiver will be presumed unless he assert his right by a direct proceeding to set aside the action of the officer.

2. As against subsequent purchasers and creditors, it is not essential to the validity of a levy of an execution on land, that the debtor be without chattel property on which to levy; nor will the levy be rendered invalid or ineffectual to create a lien, by the omission of the officer to indorse on the writ, no goods.

3. A valid levy of a foreign execution on land of the debtor has then the effect of extending the lien of the judgment to the land seized; and the lien is not limited in duration to the time the writ has to run, but may be preserved and continued in force, as long as the judgment remains unsatisfied and is not allowed to become dormant, in like manner that the lien of the judgment on land in the county where rendered, may be.

4. Return of the writ by direction of the creditor, without a sale of the property, is not a discharge of the lien.

5. The entries on the foreign execution docket which the sheriff is required to make, of the date and amount of the judgment, with a copy of the levy, and description of the land, are constructive notice of the lien, binding upon subsequent purchasers and creditors, while the lien remains in force.

Judgment affirmed.

1030. *Lewis H. Mason v. J. F. C. Hull*, assignee, etc. Error to the circuit court of Crawford county.

WILLIAMS, C. J.

1. A lien obtained by the levy of a foreign execution on the lands of the judgment debtor, is not waived nor abandoned by suing out another execution on the judgment, and causing it to be levied on the same lands.

2. The rule that a creditor who has a lien on one fund only, may compel another creditor having a prior lien thereon and also a lien upon another fund, to exhaust the latter before resorting to the former, is applicable only where both funds are the property of the common debtor; it has no application where the exclusive fund is the property of a surety for the debt for which that fund is bound.

Judgment of the circuit court reversed and that of the common pleas affirmed.

3593. *The Methodist Protestant Church, Cincinnati, O., v. Harry L. Laws et al.* Error to the circuit court of Hamilton county. Judgment affirmed.

3611. *The Wheeling & Lake Erie Railway Company v. William Henderlich.* Error to the circuit court of Ottawa county. Judgment reversed and cause remanded for reasons stated in journal entry.

3643. *Charles H. Kilgour v. Martin Groeschel.* Error to the general term of the superior court of Cincinnati. Judgment affirmed.

3943. *F. Edward Snyder v. Peter G. Albright.* Error to the circuit court of Stark county. Judgment affirmed.

4121. *William F. Hale v. The State of Ohio.* Error to the circuit court of Jackson county. Judgment affirmed.

4398. *Clara Plumley v. Thomas H. Ballard.* Error to the circuit court of Ashtabula county.

4424. *The Cincinnati, Hamilton & Dayton Railroad Company v. George C. Brown, etc.* Error to the circuit court of Butler county. Judgment affirmed.

4762. *The State of Ohio ex rel. J. W. Willard et al. v. John W. Fawcett et al.* Error to the Circuit Court of Cuyahoga county. Judgment affirmed.

4927. *The New York, Pennsylvania & Ohio R. R. Co. et al. v. John M. McGovern.* Error to the Circuit Court of Cuyahoga county. Judgment affirmed.

5298. *Romulus Cotell v. The State of Ohio.* Error to the Circuit Court of Summit county. Judgment reversed and case remanded for a new trial, on the authority of *Kelch v. State*, for error in the charge of the Court as to the degree of proof required to establish defense of insanity. No other error is found in the record.

5320. *The State of Ohio ex rel. John J. Lentz et al. v. August Schleckman et al.* Mandamus. Dismissed by consent of parties at costs of the relators.

#### Motion Docket.

2717. *George L. Converse v. Henry J. Booth et al.* Motion by defendants to set aside the order to reinstate cause No. 4221, on the general docket. Motion overruled, any question of jurisdiction may be heard when cause is submitted.

2769. *The H. B. Claffin Company et al. v. Aaron Evans et al.* Motion by plaintiffs for allowance of attorneys' fee in cause No. 3752, on the general docket. Motion allowed and counsel fee fixed at \$600.

2771. *I. J. Miller et al., trustees, v. E. W. Kittredge.* Motion by defendant to advance cause No. 5215, on the general docket. Motion allowed.

2772. *Lorenzo D. Hagerty, Judge of Probate Court, v. The State of Ohio ex rel. Prosecuting attorney Franklin county, O.* Motion by plaintiff to advance cause No. 5317 and to be heard with cause No. 5027, on the general docket. Motion allowed.

2773. *A. J. Gilchrist, receiver, v. Hobart M. Stocking.* Motion to extend time for printing record in cause No. 5221, on the general docket. Motion allowed and time extended to January 1, 1897.

2774. *D. Shanahan et al. v. Amos B. Cole.* Motion by plaintiffs for extension of time to file printed briefs in cause No. 4499, on the general docket. Motion allowed and time extended to December 1, 1896.

2775. *William H. Gaylord et al. v. R. S. Hubbard, treasurer.* Motion by plaintiffs to advance cause No. 5083, on the general docket. Motion allowed.

2776. *The Village of Dennison, O., v. Owney Daugherty.* Motion for leave to file a petition

in error to the circuit court of Tuscarawas county. Motion allowed.

2777. *Mary G. Caldwell v. The City of Columbus et al.* Motion by plaintiff to reinstate cause No. 4548, on the general docket. Motion allowed.

2778. *W. W. Edge et al. v. George W. Scott et al.* Motion by defendants to consolidate causes Nos. 5277 and 5279, and to dispense with printing record in cause No. 5279, and that the record in cause No. 5277 be used in cause No. 5279, on the general docket. Motion allowed.

#### New Cases.

New cases filed in the supreme court since November 5, 1896:

5311. *The Cadwaller Milling Co. v. Alice Myers, Adm'x.* Error to the circuit court of Seneca county. A. T. Stackhouse, Seney & Saylor, for plaintiffs; Brewer & Brewer, for defendant.

5312. *George Hartman et al. v. Caroline Sawyer.* Error to the circuit court of Erie county. Garver & Garver, for plaintiffs; Vickery Bros., for defendant.

5313. *Cyrus W. Lenhart v. William L. Ketcham et al.* Error to the circuit court of Wood county. Faber & Painter, for plaintiff; Troup & Dunn and Dodge & Canary, for defendants.

5314. *Roswell Derby, jr., v. Eugenia Heath.* Error to the circuit court of Erie county. C. P. & L. W. Wickham, for plaintiff; Phinney & Merrill, for defendant.

5315. *John Burson et al., Commissioners, v. Peter Hixson.* Error to the circuit court of Athens county. Wood & Wood, Sleeper, Sayer & Davise, Grosvenor, Jones & Worstell, for plaintiff; D. M. Jewett and A. M. Lewis, for defendant.

5316. *The State of Ohio ex rel. Jesse A. Watkins v. Augustus J. Frame, Audr.* Error to the circuit court of Athens county. C. B. Pierce, for plaintiff.

5317. *Lorenzo D. Hagerty, Judge, v. The State of Ohio ex rel. Prosecuting Attorney.* Error to the circuit court of Franklin county. Harrison, Olds & Henderson, for plaintiff; Joseph H. Dyer, for defendant.

5318. *The Massillon Bridge Co. et al. v. The Cambria Iron Co. et al.* Error to the circuit court of Seneca county. Dore & Dore, Platt, Black & Wagner, for plaintiffs; Ridgely & Abbott, George E. Schroth, W. H. Dore, P. H. Jayne, Noble, Keppel & Noble, F. Cronise, Seney & Saylor, Derr & Corbett, L. Lukes, E. E. Williams, J. V. Jones and Willie Bacon, for defendants.

5319. *Matilda C. Search v. John W. Auselment.* Error to the circuit court of Marion county. W. J. Davis, for plaintiff; G. E. Mouser, Schofield, Dunfee & Schofield, for defendant.

5320. *State of Ohio ex rel. John J. Lentz et al. v. August Schleckman, Chairman, et al. Mandamus.* George E. Okey, Selwyn N. Owen, Lincoln Fritter and Louis G. Addison, for plaintiffs; F. F. Albery and W. O. Henderson, for defendants.

5321. *The Milwaukee Mechanics' Insurance Co. of Milwaukee, Wis., v. T. W. R. Carnahan.* Error to the circuit court of Hancock county. Ross & Kinder and Thomas A. Logan, for plaintiff; Pendleton & Whiteley, for defendant.

New cases filed in the supreme court of Ohio since November 12, 1896.

5322. *The First National Bank of Chicago, Ill., et al. v. The F. C. Trebein Co. et al.* Error to the circuit court of Greene county. Charles Kyle and Charles Darlington for plaintiffs; F. M. Shaffer for defendants.

5323. *John Logan, trustee, v. William J. Horney et al.* Error to the circuit court of Fayette county. John Logan for plaintiff; Vandin & Chaffin for defendants.

5324. *The Incorporated Village of Milan et al. v. Henry Kelley.* Error to the circuit court of Erie county. Theaclon Alvord for plaintiffs; Hull & Gerrin for defendant.

5325. *Jacob Foehl v. Hannah C. White.* Error to the circuit court of Tuscarawas county. John S. Graham for plaintiff; Welty & Albaugh for defendant.

5326. *Charles Vincent v. Clapira Taylor.* Error to the circuit court of Fayette county. Harper & Harper for plaintiff; Mills Gardner for defendant.

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*The growth of this paper during 1896 has been so marked that we confidently assert that it now has a greater circulation than any other Ohio law paper. It also contains so much more legal matter that we are justified in claiming it to be the leading paper in its class.*

## COMMENDATIONS.

The following selections give the pith of some of the many commendatory letters we have received from time to time. Want of space prevents our giving all the letters, and we submit these few as specimens of the whole.

A well known lawyer in northern Ohio writes:

"The Ohio Legal News, I believe is the best legal paper ever published in Ohio."

Another says:

"I have been a subscriber to all the other Ohio law papers published within the last thirty-five years, and am frank to say that yours is ahead of any one of them."

A leading member of the Cincinnati bar says:

"You have made hustling times with your competitor, and although you have made him improve his paper considerably, it is yet far behind yours."

An attorney of prominence at Columbus says:

"I learn that your journal is regarded by the legal profession as the leading one, and as I desire to keep up with the procession, so I send you my subscription."

A distinguished attorney in central Ohio writes:

"Allow me to congratulate you on the excellency of the Ohio Legal News. I consider it the best law journal in existence to-day."

A well known ex-judge, upon return to practice wrote:

"I have become in the habit of relying upon your Legal News to keep myself posted in the matter of current decisions, and items of news, while upon the bench, and I should be unable while in the practice to go ahead with proper assurance, if I did not subscribe for the News."

A retiring circuit court judge wrote us:

"You have not only set the pace for competitors, but made it so rapid that they do not appear to be in the race. I am unable to see how a lawyer can be without your paper."

Another member of the bench says:

"Containing as it does so many of the current decisions of interest not published elsewhere, it seems impossible that a lawyer who aims at success can permit himself to go without it."

Another writes:

"I like your plan of publishing the decisions. It will be a good thing to furnish the profession with the bound volumes as rapidly as completed. I like also the good fat volumes you are publishing."

The supreme court has decided that the law exacting from foreign corporations doing business in this state a fee equal to the fee they would have had to pay if incorporated in Ohio, does not apply to corporations of other states doing business in Ohio by traveling salesmen only.

The United States supreme court last week rendered an opinion sustaining the constitutionality of the Wright Irrigation law of California and overruling the decision of the United States circuit court for the California district, which was against the law's validity. The case in which the opinion was rendered was that of the *Fallbrook Irrigation Co. v. Bradley*. This case has attracted widespread attention throughout the Rocky mountains and Pacific coast regions, because of its importance to the material interests of the entire arid belt. The suit has also gained prominence in the central west and east, through the fact that ex-President Harrison was one of the counsel who argued the case before the supreme court, whose decision has been awaited for months. The opinion was delivered by Justice Peckham.

The case of the *United States v. Wight*, general freight agent of the B. & O. R. R., was argued in the United States supreme court recently. Wight was convicted by a jury for unlawful discrimination between shippers in violation of the interstate commerce act. It was alleged that he granted a special secret rebate of three and one-half cents per 100 weight to a shipper on beer shipped from Cincinnati to Pittsburg. A discharged employee reported the matter to the government authorities. Meanwhile the Pan Handle Road, unable to find out where the trouble was by which the B. & O. got the business, cut schedule rates. Wight's excuse on the trial was that the man given the special rate had a siding on the Pan Handle road and that the B. & O. could not get his business without giving him a rebate, which was under the guise of an allowance for cartage. The case was argued by Hugh L. Bond, of Baltimore, for Wight, and Edward B. Whitney, assistant attorney-general, for the United States. This is the first criminal conviction of a railroad officer for unjust discrimination and the case has been watched by shippers and railroad men generally.

Last Saturday, in the criminal court of Cincinnati, in the case of William Haas, who cut the throat of his employer's wife, on the third of July last, a verdict of guilty of first degree murder was returned. Haas will be the first victim to sit in the electric chair, now under construction at the state penitentiary, and suffer death by electrocution.

The conclusions reached by Judges Evans and Wilson as to the degree of murder of which William Haas was guilty, was announced by Judge Evans, who spoke for the court and who reviewed the testimony in detail occupying nearly an hour. The finding was not announced until the closing sentence, when Judge Evans said, lowering his voice which was choked with emotion, "the court is reluctantly driven to the conclusion that the defendant is guilty of ——" and the voice stopped, when after a moment's pause, Judge Wilson, coming to Judge Evans' aid, added, "murder in the first degree."

#### THE FAIR WILL.

The contest over the will of the late James G. Fair ended last week by the withdrawal of the so called pencil will, which had been offered for probate. The executor under the pencil will, in withdrawing the document, stated that his reason for his action was that the position of Mrs. Nettie Craven, might be strengthened. Mrs. Craven had joined with the executor in submitting the pencil will, but she claims to be the widow of the late senator Fair, and claims Fair gave her deeds to two pieces of city property valued at a million and a half dollars. It was feared that if the pencil will should be declared a forgery a similar fate might follow for the alleged marriage contract and deeds to Mrs. Craven, which the Fair heirs pronounce forgeries. All the Fair children who at first supported the pencil will now declare it a forgery also. They joined in a petition for the probating of the trust will, dated three days earlier than the pencil will. The trust will was admitted to probate on Monday of last week, and it is believed that litigation, which bids fair to be interminable, is now practically ended. The trust feature of the probated will was declared illegal so far as the real estate involved is concerned. A similar decision regarding the personal property of the estate is now anticipated. The trust will, with the trustee provisions eliminated, would be eminently satisfactory to the children of James G. Fair.

A queer complication has arisen in the Brown-Clermont district, on account of the action of the last legislature, detaching Adams county from this district and transferring it to the second subdivision of the seventh district the new subdivision to date from September 1, 1896. The act provided that Judge Collins (R), of Adams county, who had been elected common pleas judge in 1891 for the first subdivision of the fifth district, comprising Adams, Brown, and Clermont counties, should serve the remainder of his term from September to February 8, 1897, in the new subdivision. The democrats, very naturally, construed this act to create a vacancy in the Brown-Clermont subdivision for this period, and nominated and elected D. B. Pearson, of Brown county, to fill this alleged short term.

Pearson, having been refused his commission as judge, filed a petition in mandamus in the supreme court. The petition is styled: *The State of Ohio, ex rel. D. V. Pearson v. Asa S. Bushnell, and S. M. Taylor*. The question at issue, as presented in the petition, is: can the legislature deport a judge from one district to another, and compel him to serve out his term in a district to which he was not elected, thus leaving a vacancy in the district to which he was elected.

#### ADMISSION OF PRISONERS TO THE MANSFIELD REFORMATORY.

Some time ago we published a short opinion, delivered by Judge Miller of the Clark county common pleas court, and which will be found on page 328 of vol. IV, O. D. The question involved in this case involves the peculiar and somewhat muddled condition of our laws relating to the inmates of our State reformatory, located at Mansfield. The court in this case held, that "under the present condition of the laws relating to inmates of the Ohio State reformatory, at Mansfield, none can be sent to said reformatory but males between sixteen and thirty years of age, convicted for the first time for an offense punishable by imprisonment in the penitentiary, and that being discretionary with the court passing sentence."

Since the opinion as announced by Judge Miller has been handed down, Attorney-General Monnett has had the question of the interpretation of the law governing the relations existing between the reformatory at Mansfield and

the state penitentiary submitted to him, and and to which question the attorney-general has filed a very learned and exhaustive opinion, which will be found in this week's issue of the LEGAL NEWS.

It is hard to tell just exactly what the law regulating the admission of prisoners to the Mansfield reformatory is, and just at present this is a question that is perplexing the minds of the officials of that institution, and the lawyers in general throughout the state, and is causing wrinkles of care and worry to come over their brows. It seems after a careful search of the laws relating to the reformatory, that the legislature through successive sessions has amended, abridged and revised laws and sections of laws, regarding this institution, in such a disinterested and generous way that now, when the institution is open and ready for business, nobody is exactly clear on the main and vital question that has been raised, as to who can be legally sent to such institution under the present condition of the laws governing the same. It is really a bad case of mixed up legislation, and nothing but the clear headed act of a new legislature can, eventually, straighten it out. The first law regarding this institution was passed in 1884, and since then every legislature that has met, with but few exceptions, seemed to feel as though it was not doing its duty or was not keeping apace with the preceding legislature, unless they in turn passed a law regarding the reformatory before adjournment, so that now through the generosity of our law makers, we have on our statute books no less than half a dozen conflicting measures, some of which have been amended either in part or in whole, and some of which were even forgotten by our omnipotent legislators in their free-for-all eagerness to get through a new measure, which only added more confusion to the then existing laws.

The law as passed April 14, 1891, is the only one now in force, and the one which must be observed in sentencing prisoners to the reformatory, but by this law as it now stands the very purpose for which the institution was built is defeated, since under it neither women nor boys under sixteen can be sent to the reformatory, but only males between the ages of sixteen and thirty, and who have never been convicted of a previous offense, and the offense for which they are to be sentenced to the reformatory be not that of murder in any degree. So that now nothing remains for the officials of that institution

but to patiently wait for the next legislature, and when that omnipotent body of law makers convene, they can eclipse all previous legislatures and add fame to their names by wiping from the statute books all laws applying to the reformatory, and then by their great wisdom pass a new law which can be understood by everyone and which will obviate all present difficulties.

### STATE REFORMATORY,

[AN OPINION.]

COLUMBUS, O., November 13, 1896.

Hon. W. C. Cherrington, R. W. C. Gregg,  
C. S. Muscroft and L. F. Limbert, Joint  
Committee:

DEAR SIRS: This department is in receipt of a communication from you as a committee appointed by the joint boards of the Ohio penitentiary and the Ohio State reformatory, requesting a written opinion as to certain propositions and a construction of certain sections of the act passed April 24, 1891, governing the Ohio State reformatory.

Your first inquiry is: "Can the managers of the Ohio State reformatory receive prisoners of any different ages than those specified in section 7 of the act passed April 24, 1891?"

Section 7, of so much thereof as is pertinent to your inquiry, provides that said board of managers shall receive all male criminals between the ages of 16 and 30, and not known to have been previously sentenced to a state prison in this or any other state, who shall be legally sentenced to said Ohio State reformatory on conviction of any criminal offense in any court having jurisdiction thereof. And any such court may, in its discretion, sentence to said Ohio State reformatory any such male person convicted of a crime punishable by imprisonment in the Ohio penitentiary between the ages of 16 and 30 as aforesaid.

This section standing alone might bear a somewhat different construction than that to be given it when taken in connection with other sections of the same act, and sections governing the same subject matter in other parts of the statutes.

Section 753, Revised Statutes, provides that a male youth not over 16 nor under 10 years of age, may be committed to the Boys' Industrial school by any judge of police

court, judge of common pleas court or of probate court, upon conviction of any offense against the laws of the state.

Section 761, as amended April 21, 1893, provides that the governor may cause any juvenile offender confined in the penitentiary or sentenced to the penitentiary, to be transported to the Boys' Industrial school. And the governor may for satisfactory reasons remand the transfer from the school to the penitentiary in compliance with that statute.

Section 754 of the statutes provides that any such youth convicted of any crime or offense, the punishment of which is in whole or in part confinement in jail or the penitentiary, may at the discretion of the court giving sentence, in lieu of being sentenced to the jail or penitentiary, be committed to the Boys' Industrial school. But section 14 of the act of April 24, 1891, provides that said managers also upon the order of the governor, shall receive from the Ohio Industrial school for boys, such of its inmates as he may deem advisable to transfer to the Ohio State reformatory, and hereafter no prisoners shall be transferred from the Ohio penitentiary to the Boys' Industrial school.

From this it would appear that at present there is, as to one element in this inquiry, a direct contradiction by the statute in defining the governor's duties as to the transfer of prisoners from the Boys' Industrial school. The last clause of section 14 of the act of 1891 indicates that the governor is prohibited from transferring any prisoner from the Ohio penitentiary to the Boys' Industrial school, and the act of 1893, as above cited, says the governor may remand or transfer to the penitentiary, offenders sentenced thereto, and so transfer to the Boys' Industrial school back to the penitentiary to serve out their remaining sentence. And the governor may also, under said law of 1893, cause any juvenile offenders to be transferred from the penitentiary to the Boys' Industrial school.

The old rule of construction in cases of this kind would apply, namely, where two statutes passed at different times, both relating to the same subject matter, but inconsistent with each other, the court will inquire as to the dates of the irrelative enactments and will give effect to that which is last in point of time, rejecting the other. And in cases of a conflict between the two parts or provisions of such statute which is not so radical as to require that one or the other shall be absolutely disregarded, the court will endeavor to so modify

the earlier provisions as to bring them into harmony and consistency with the latter.—16 Fed., 751; 52 Fed., 652; 6 Ark., 24.

Applying this rule, I must hold that the powers granted the governor under section 761, passed April 21, 1893, must control in the construction as to the subject matter of transferring juvenile prisoners from the penitentiary to the Boys' Industrial school.

Taking the view of the statutes as they now stand, both the court and the governor have a right to transfer prisoners to the Boys' Industrial school between the ages of 10 and 16. And the age defined in section 7 applies only to the court in its sentencing of prisoners in the first instance to the Ohio State reformatory. And the governor shall have the right, under section 14, to order the managers, in accordance with that section, to receive from the Ohio Industrial school for boys such of its inmates as he may deem advisable to transfer to the Ohio State reformatory, clearly between the ages of 10 and 16 years; or any other age that they may legally be in the Ohio Industrial school for boys.

It would seem the proper course, to save further confusion between courts and the boards of managers and the governor's duties for the judges of our respective courts, as far as possible, to sentence all eligible criminals to the Industrial school between the ages of ten and sixteen, leaving it to the discretion of the governor, under section 14 of this act referred to, to direct and recommend the transfer to the Ohio State reformatory from such school.

Your said joint committee asks under your second proposition, in what manner boys who have already been sentenced to the Ohio penitentiary may legally be removed or transferred to the reformatory. By this inquiry I suppose you refer to juvenile criminals between the ages of ten and sixteen, who would be eligible in any event to such reformatory. Having already held that prisoners may be transferred to the reformatory from the Industrial school regardless of the age limit, upon the order of the governor under section 14 of the act of 1891, would answer the proposition as to one means or mode of transfer.

A second mode would be under the powers granted to the board of managers of the Ohio State reformatory in section 14, which provides that such board of managers shall have authority to make requisitions upon the manager of the Ohio penitentiary, who shall select the

number required \* \* \* and transfer them to said reformatory \* \* \* under the rules and regulations thereof. And the board of managers are hereby authorized to receive and detain \* \* \* such prisoners so transferred. Inasmuch as they use the plural "requisitions" and the term "youthful," and inasmuch as the age limit is not confined to from sixteen to thirty of prisoners transferred from the Industrial school, and the clear intention of the law seems to be for the reformatory to take charge of and provide for the youths under sixteen, I am of the opinion that the board of managers of the reformatory can make repeated requisitions upon the Ohio penitentiary under section 14 for any criminals under thirty years of age. And that their original requisition heretofore made did not exhaust their powers under said act.

The third mode in which prisoners from the Ohio state penitentiary under sixteen years of age may reach the Ohio State reformatory, would be for the governor to remand them to the Industrial school and then, under the other statute, from the Industrial school to the reformatory. There are many other contradictory statements or questions that might be raised, kindred to those inquired about, but I have confined my replies closely to your inquiries.

Respectfully submitted,

F. S. MONNETT,  
*Attorney-General.*

#### MALICIOUS PROSECUTION—DAMAGES.

[ Franklin Common Pleas Court, 1896. ]

FANNIE L. JOHNSON v. MCDANIEL & JOHNSON

##### 1. THE QUESTION OF PROBABLE CAUSE IS FOR THE JURY.

Following the decision in *Ash v. Marlow* (20 Ohio 119), the question of probable cause in a malicious prosecution case, being a mixed question of law and fact, is submitted to the jury for decision.

##### 2. EVIDENCE COMPETENT TO NEGATIVE MALICE IN A MALICIOUS PROSECUTION.

The proof of the advice of an attorney advising the defendant that he had reasonable cause for instituting the alleged malicious prosecution is competent to negative the malice and mitigate the damages. (*White v. Tucker*, 16 O. S., 768.)

##### 3. ESTIMATING EXEMPLARY DAMAGES.

In estimating the exemplary damages, the

respective positions occupied in society by the plaintiff and defendant may be considered by the jury.

**Charge to the Jury delivered by Judge Pugh.**

**GENTLEMEN OF THE JURY:** This action is brought by the plaintiff to recover damages claimed in consequence of the plaintiff's alleged false and illegal arrest and imprisonment. False imprisonment is the unlawful restraint of a person against his will, either with or without process. It is a trespass to the person, committed by one against another, by unlawfully arresting and detaining him or her against his or her will. It is a direct wrong, or illegal act, in which the defendants must have participated, or which must have been in their direct or indirect procurement.

The facts are requisite to constitute the wrong; (1) detention of the person of the plaintiff; (2) the unlawfulness of the detention.

A pure, naked, unlawful detention, unaffected by any question of motive or purpose, constitutes false imprisonment. The want of unlawful authority is an essential element of the wrong.

The substance of the plaintiff's petition is, that on the 31st day of August, 1896, the defendants falsely, maliciously, and, without probable cause, charged the plaintiff, in the police court of this city with having committed the offense of malicious destruction of property belonging to the defendants, to the amount of \$35.00; that they procured the clerk of that court to issue a warrant for her arrest, which he issued; and thereupon three policemen arrested her, took her to and confined her, in a cell that was filthy and infested with vermin, of the city prison, without anything to eat or drink, for the space of eight hours; and that on the trial of the case, before the police court, she was acquitted of the charge. She charges that she was thereby insulted, humiliated and injured in her credit and reputation; and that, on by reason of the alleged acts of the defendants, she suffered great pain and anguish of body and mind, and that her health was seriously impaired, and that she has since been confined to bed under the care of a physician.

The answer of the defendants admits that the plaintiff was arrested on a warrant procured by them; but they deny that they falsely, maliciously, and without probable cause, procured her arrest, or that they had anything to do with the time and manner of her arrest, or that, as a result of her arrest and imprisonment, and of the treatment to which she was

subjected, her health was seriously impaired, or that she has since been confined under the care of a physician, or has been subjected to much humiliation, physical and mental anguish, or that the cell in which she was confined was filthy and infested with vermin.

The defendants, therefore, admit that the plaintiff was charged in the criminal case with malicious destruction of property to the amount of \$35.00; that she was arrested by three policemen on a warrant whose issuance was procured by them; that the plaintiff was confined in the city prison about eight hours, and compelled to give bail; and that on the trial of the case in police court, she was acquitted, and that that prosecution is fully ended and determined.

The burden of proving all the facts necessary to entitle the plaintiff to recover, except those which are admitted, rested upon the plaintiff, and she could only discharge the burden by proving them by a preponderance of the evidence.

The defendants, having admitted that the plaintiff was arrested and imprisoned on a warrant which they procured to be issued, the plaintiff did not have to prove those essential facts.

The first inquiry and determination which you will have to make, on the evidence, and under this charge, is whether the arrest and also imprisonment were without reasonable cause.

The burden of proving the want of reasonable cause was upon the plaintiff.

The question is, did the defendants have reasonable or probable cause to warrant them in the belief that the plaintiff had committed the offense charged in the affidavit of the defendant, Johnson, and in the warrant, in virtue of which she was arrested by the officers, namely, malicious destruction of their property? Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense with which he or she is charged. It does not depend upon the guilt or innocence of the accused person, or upon the fact that the crime has been committed. In making the criminal accusation against the plaintiff, in the police court, the defendants had a right to act upon appearances; and, if the apparent facts were such that a discreet and prudent person would have been led to the belief that the offense charged had been committed by the plaintiff, they were

justified, although it turned out that they were deceived, and that the plaintiff was innocent of the offense. This rule is founded upon grounds of public policy in order to encourage the exposure and punishment of crime. Public policy requires that a person be protected who, in good faith, and upon reasonable grounds, causes an arrest upon a criminal charge, and the law will not subject him to liability therefor. But a groundless suspicion, unwarranted by the conduct of the accused, or by the facts known to the accuser, when the accusation is made, and which would not be strong enough to warrant a cautious person in believing the accused guilty, will not exempt the accuser from liability to the accused for damages in causing his arrest. It is not the right of every citizen to arrest, or to cause to be arrested, another, or to deprive him, or her, of his, or her, liberty. That right can never exist except a legal justification exist for it. The presumption that all men, or women, are innocent, makes the treatment of them as criminals, without justification, a wrong.

The mere belief of the defendants that they had reasonable cause for prosecuting the plaintiff, was not sufficient. It must have been an honest and sincere belief, and it must have been based upon reasonable grounds.

It appears from the evidence that the defendant, Johnson, verified the affidavit upon which the warrant in the criminal prosecution was issued; and the affidavit charges that the plaintiff, on the 20th day of August, 1896, wilfully and maliciously injured and destroyed the property in question, by cutting ten sash cords and one panel door and otherwise destroyed said property. Johnson made the affidavit solely upon representations which had been made to him by the defendant, McDaniell. McDaniell testified that he obtained and knew the following facts: That a hook and staple, or hooks and staples were driven into one of the doors; that four or five or six feet of the paper had been torn off of one of the walls of the house, and a good lot of it was lying on the floor; that two or three of the window cords had been cut off or broken; that Mrs. Lyons had told him that she had heard some one who, she supposed, was the plaintiff, say that they would do whatever injury to the property they could. McDaniell and Johnson also testified that the house was in good condition when the plaintiff and her husband moved into it. The plaintiff offered the testimony of herself and others tending to disprove

some or all of the testimony of McDaniell and Johnson. It is not necessary to detail that testimony, in view of the purpose for which I quote the testimony of McDaniell. Whether the matters about which McDaniell and Johnson testified and to which I have just referred are true or not, and whether, if they were true, they knew of them, are questions of fact which it is your exclusive province to decide.

If you disbelieve the testimony of McDaniell and Johnson and believe the opposing testimony offered by the plaintiff, as to the matters just mentioned, there was no probable cause for the criminal prosecution of the plaintiff.

But if you should believe the testimony of McDaniell and Johnson; in other words, if you should believe that McDaniell, after the plaintiff and her husband vacated the house, found that two or more window cords had been cut or broken; that four or five or six feet of the wall paper had been torn off and a good lot of it was lying on the floor; that a hook or staple, or hooks and staples, had been driven into the door; that Mrs. Lyons told McDaniell that the plaintiff had threatened to do all the harm they could to the property; and, if you further believe from the testimony that the said McDaniell imparted these facts to Johnson before he verified the affidavit; and, if you further believe from the evidence that the house was in good condition, when the plaintiff and her husband moved into it, and it is not probable that other persons had access to the house, and had cut or broken the window cords, and had driven hooks, staples into the door, and had torn off the paper from the wall, then, the question for you to determine is, whether an ordinarily prudent person would have been led to believe, from these facts, that the plaintiff was guilty of the offense charged in the affidavit. If your conclusion should be that an ordinarily prudent person would not, by these facts have been persuaded to believe that the plaintiff was thus guilty, then, there was no probable cause for the prosecution. On the other hand, if you should conclude that an ordinarily prudent person would have believed, from these facts, that she was guilty, then, there was reasonable cause for the prosecution.

Again, if you should find from the evidence that the defendants omitted to make such inquiry and investigation into the conduct of the plaintiff as would have suggested itself to an ordinarily prudent person, and that such investigation would have discovered the fact that the plaintiff was not guilty of the offense

charged in the affidavit, then, the defendant can not be absolved on the ground that there was reasonable cause to believe that she was guilty.

If you believe from the evidence that the plaintiff, up to the time of her arrest, had uniformly borne a good reputation as a law abiding and well behaved person, and that the defendants knew that such was her reputation, then, that fact is a proper one to be considered, in connection with all the other facts in the case, in determining whether or not the defendants had a reasonable cause to believe, and did believe, in good faith, that the plaintiff was guilty of the offense charged against her.

It was also incumbent upon the plaintiff in this case to prove that the defendants were actuated by malice in their conduct, namely, in instituting and carrying on the criminal prosecution against her, in the police court.

It is not easy to define what the law means by malice. It embraces ill-will, hatred, jealousy, revenge, and like feelings. This is called actual malice. If the defendants were impelled by such feelings against the plaintiff, this branch of the case is made out.

But this is not all the law means by malice. It was not necessary to prove that the defendants had any personal grudge or ill-will or hatred for the plaintiff when they prosecuted her. If the evidence satisfies you that the defendants, in beginning and conducting the criminal prosecution against the plaintiff, showed a gross, wanton, reckless disregard of the plaintiff's rights; if you find that there was no excuse for such a proceeding upon their part; if you find there was no reasonable ground for it—then, although the evidence fails to prove that they entertained any personal ill-will or hatred toward the plaintiff, you would be justified in finding that their action was malicious. That would be evidence tending to prove legal malice. While this is true, still you must be satisfied that the prosecution was instituted and carried on maliciously, by the defendants.

The questions for you to decide, on this branch of the case, are: Had the defendants, or either of them, any ill-feeling, any ill-will, towards the plaintiff, or any desire to wrongfully prosecute and punish the plaintiff?

Was it to wrong or injure her in any way that that prosecution was instituted and carried on? Or was it done simply from an honest, sincere belief—erroneous though it might be—that she was guilty of the offense charged?

You will see from what I have said that the plaintiff had to prove two facts to entitle her to a verdict. The law does not allow her to recover damages simply because a criminal prosecution was begun and carried on against her. It requires more than this fact. She has to prove that there was no probable, or reasonable, cause for the prosecution, and that the defendants were actuated by malice. These two facts must co-exist, they must concur, to sustain this action. The existence and proof of either of them, without the other, is not enough to authorize a verdict.

It is competent for you to infer malice, legal malice, from the want of probable cause for the prosecution, if you find that to be a fact.

As part of their defense, the defendants rely upon the advice of an attorney. They claim that, before they began the criminal prosecution against the plaintiff, they consulted with, and were advised by, an attorney to institute the prosecution.

Whether this can avail them anything depends upon whether they did what the law, in such a case, required of them. If they took the pains to inform themselves of all the facts which, by reasonable diligence, could be obtained, submitted them all truthfully to their counsel, a reputable attorney, omitting none; and if the attorney advised them that they had ground for prosecuting the plaintiff; and, then, if the defendants, taking the advice of the attorney, instituted the criminal prosecution and carried it on afterwards, in the honest belief that they had reasonable ground for it, relieves them from the imputation of malice, although the prosecution failed, and, as a matter of fact the advice of the attorney was erroneous: If the evidence satisfied you that it rebuts the charge of malice, it defeats the plaintiff's case; because there can be no verdict in her favor unless malice has been proved.

The fact that the defendants consulted an attorney, and acted on his advice, if it has been proved, may be considered also as mitigating the damages.

But, if you are satisfied, from all the facts proved in the case, that, notwithstanding the advice of the attorney, there was a malicious intention on the part of the defendants to injure the plaintiff, or that there was an unreasonable and reckless disregard to her rights by them, or that the true facts were not stated to the attorney; or that there was no honest belief entertained by them in the existence of a

cause for the prosecution, and no *bona fide* reliance upon the advice of the attorney, but that it was sought merely as a cloak to do the plaintiff a wrong, you should not conclude that the charge of malice has been negatived or disproved; nor should you in that case consider it as mitigating the damages.

The value and effect of obtaining and *bona fide* relying upon the advice of a reputable lawyer is, as I have told you, to *prima facie* rebut the charge of malice against the defendants; and it imposes the duty upon the plaintiff to bring home to the defendants the existence of malice as the true motive of their conduct.

Whether these facts, if they are proved, are to have that effect and value is for you to determine. Like all of the other facts in the case they are to have that effect which you, taking all of the other facts proved, choose to give them.

It is for your wisdom to determine their weight and value, under the circumstances of the case, as bearing upon the question of malice and the amount of the damages.

If you find that there was reasonable cause for the arrest and the prosecution of the plaintiff, you will return a verdict for the defendants. Your verdict will also be for them, if you find that they were not actuated by malice, although you may conclude that the prosecution was without reasonable cause.

If, however, you find, from the whole evidence, and under these instructions, that the plaintiff is entitled to recover, you will proceed to the consideration and decision of the question of damages. Damages may be compensatory, and they may be exemplary or punitive. Compensatory damages are for the purpose of making the plaintiff whole for the injury done to her character and reputation, and for injury to her feelings, for humiliation, and anguish of mind.

There is no inflexible standard by which the damages can be measured or estimated.

Characters have no market price, as horses, cattle, and other property have.

The extent of the injury must be determined from the evidence. You must exercise your sound judgment and discretion and defer to your sense of justice. You have a right, and it is your duty to consider all of the circumstances of the case.

As part of the compensatory damages, you can assess a reasonable attorney's fee for the plaintiff to pay counsel for defending her in the police court, and also whatever may be the

value of the time that was consumed by her in making that defense.

As part of the compensatory damages, you can also assess damages which will compensate her for the injury that may have been done to her character, reputation and credit by the initiation and prosecution of the charge in the police court.

You can also incorporate in your verdict, as compensatory damages, what will remunerate the plaintiff for the mortification, humiliation and shame suffered by her by reason of the arrest and imprisonment.

If you find the fact to be that the plaintiff was incarcerated in a filthy cell, and was not allowed any food or water for eight hours, and together with her husband, was separated during that time from her young child, you can consider that in determining whether the arrest and imprisonment were a personal insult and indignity to her, which could necessarily, or probably, impair her bodily health and wound her feelings, producing mental anguish.

Should you conclude that the defendants, in beginning and conducting the criminal prosecution against the plaintiff, were swayed by actual malice, in contradistinction from legal malice, then, computing the damages, you may give what in law are called exemplary or punitive damages, or what is sometimes called "smart money." Such damages may be awarded to vindicate the law, to punish the defendants, and to deter others from doing like wrongs, and hence these names for such additional damages. But you should not be deceived by the terms that I have used, or by the principle of punishment in exemplary damages, into assessing excessive damages, or into rendering an unjust verdict. The court would not tolerate an excessive verdict for damages awarded by way of punishment.

In estimating the exemplary damages, it is competent for you to consider the standing of the defendants. A man of high character and of known force and influence in the community, may injure another by wrongfully prosecuting him in a criminal case more than a man of less character can do. There was evidence tending to show how much the defendants were worth, introduced. That evidence was admitted, and it is to be considered by you, for the purpose of showing the standing of the defendants in the community, "to enable you to determine how much the plaintiff has been injured." (21 O. S., 545-6.) It is not to be used, however, for the purpose of determining their ability to respond in damages.

So you may also consider the character and standing of the plaintiff. If she had a well established character or reputation, there is less probability of the wrongful criminal prosecution injuring her than there would be if she had been a new woman just starting in the effort to build up a reputation.

I have already told you, and now reiterate it, that you may consider in mitigation of the damages the fact—if it is a fact proved—that the defendants consulted and were advised by a reputable attorney that they had reasonable ground for prosecuting the plaintiff.

The plaintiff can not claim and recover damages for the publicity given to the alleged wrong done to her by the bringing of this suit, because it was brought of her own choice.

Unless you find from the entire evidence, and under the instructions of this charge, that the plaintiff is entitled to recover, you can not and must not award her damages out of mere sympathy. You have no right to award damages against the defendants merely because they may have sufficient means with which to pay any judgment entered on the verdict. You can only consider their pecuniary ability for the purpose already explained.

On the other hand, you should not withhold justice from the plaintiff because she occupies an humble position in life and is not shown to be wealthy.

You should decide this case precisely as you would or ought to do between two individuals who are strangers to you, and neither sympathy nor prejudice should be allowed to influence your verdict in the slightest degree.

Without fear, favor, sympathy, prejudice or passion you should render such a verdict on all the facts and circumstances of the case as you, in the exercise of a sound judgment, and guided by the law as contained in the charge, consider the case entitled to.

*J. J. Chester and A. T. Seymour, for Plaintiff.*

*Wood & DeWitt, for Defendants.*

NOTE.—In *Page v. Milier* (3 Ohio Decisions, 540), according to the second syllabus, the circuit court of the sixth circuit decided that the advice of counsel "is not a full defense, but only goes to the mitigation of damages," while the supreme court in *White v. Tucker*, 16 O. S., 468 (second syllabus), decided that the defendant may prove that fact as "tending to rebut malice and to mitigate damages." True, the advice there considered was that of a magistrate. Still, there is no difference in principle between such advice and the advice of an attorney.

## SUPREME COURT PROCEEDINGS.

TUESDAY, November 24, 1896.

### General Docket.

No. 3545. Mark B. Wells, Treas., v. Mary O. Adair. Error to the circuit court of Scioto county. Judgment affirmed, one ground of reversal by the circuit court being that the verdict was against the right of evidence. Other questions not passed upon.

3637. Jane Clark et al. v. The Cleveland Refining Co. Error to the circuit court of Cuyahoga county. Judgment modified.

3645. Bartholomew Lucy v. The Metropolitan Life Insurance Co. Error to the circuit court of Cuyahoga county. Judgment affirmed.

3669. William C. Sibley et al., Ex'rs., v. Carl Lehman et al. Error to the circuit court of Scioto county. Judgment affirmed, it appearing that one ground of reversal is, that the finding of fact is against the evidence. Other questions not passed upon.

3690. Simeon M. Winn and William S. O'Neal, Assignee, etc. et al., v. Edward Prook et al. Error to the circuit court of Muskingum county. Judgment affirmed.

3713. James L. Taylor, Adm., etc., v. Filmore Musser, Auditor, etc. et al. Error to the circuit court of Scioto county. Judgment affirmed.

3721. The Pioneer Savings and Loan Co. v. Sarah C. McCormick et al. Error to the circuit court of Hancock county. Judgment affirmed.

3722. The Pioneer Savings and Loan Co. v. Edith Lichtig et al. Error to the circuit court of Hancock county. Judgment affirmed.

3732. John Wright et al. v. George Hobson, Recorder of Hamilton county. Error to the circuit court of Hamilton county. Judgment affirmed.

3783. Edwin Mansfield et al., Trustees, etc., v. Mills, Spellman & Co. Error to the circuit court of Hamilton county. Judgment affirmed.

3784. Edwin Mansfield et al., Trustees, etc., v. Michael Heberger et al. Error to the circuit court of Hamilton county. Judgment affirmed.

3857. Margaret Griffith v. The City of Findlay. Error to the circuit court of Hancock county. Judgment affirmed.

4154. Henry C. DeRhodes v. Fannie Peters. Error to the circuit court of Wood county. Judgment affirmed. Burket and Shauck, JJ., dissent.

4354. W. W. Dunnavant et al. v. Clara T. Howlett. Error to the circuit court of Richland county. Judgment affirmed.

4356. George G. McCrea et al. v. The First National Bank of St. Paris, O., et al. Error to the circuit court of Champaign county. Dismissed by consent at costs of plaintiffs in error.

4387. John Diley v. Charles Diley et al. Error to the circuit court of Fairfield county. Judgment affirmed.

4390. Alexander Glockner v. William Newland et al. Error to the circuit court of Scioto county. Judgment affirmed.

4406. Lewis Brant v. Oren J. Lyon. Error to the circuit court of Clinton county. Judgment affirmed.

4434. William C. Williamson et al., Trustees, v. Beriah Johnson, Admr. Error to the circuit court of Tuscarawas county. Judgment affirmed.

4436. John S. Smith v. Abram King. Error to the circuit court of Richland county. Judgment affirmed on the authority of Newman v. Becker, 3 L. N., 130.

4427. John S. Smith v. The Mansfield Savings Bank. Error to the circuit court of Richland county. Judgment affirmed on the authority of Newman v. Baker, 3 L. N., 130.

4455. John Y. Detwiler et al. v. Harriet J. St. John et al. Error to the circuit court of Wood county. Judgment affirmed.

4456. Jesse Brayton et al. v. E. H. Buckland. Error to the circuit court of Putnam county. Judgment affirmed.

4564. Mark Richardson v. A. J. Sandford. Error to the circuit court of Cuyahoga county. Dismissed by plaintiff in error at his costs.

4673. The C., C., C. & St. L. Ry. Co. v. Alvin Ivins. Error to the circuit court of Warren county. Judgment affirmed.

4822. The C., H. & D. R. R. Co. v. Theodore Bradshaw. Error to the circuit court of Lucas county. Judgment reversed, ground stated in the journal entry.

4829. George P. Elliott, Treas., v. Nelson Cummins, Ex'r, etc. Error to the circuit court of Williams county. Judgment affirmed.

4864. The City of Cincinnati v. The Cincinnati Street Ry. Co. Error to the circuit court of Hamilton county. Judgment affirmed.

#### Motion Docket.

2779. The Rock Plaster Manufacturing Co. et al. v. Gustavus H. Schleyer. Motion by defendant to strike the petition in error from the files and the case from the docket in cause No. 4950, on the general docket. Motion overruled.

2780. Herbert R. Gill v. The Consolidated Rock Plaster Co. et al. Motion by defendant to strike the petition in error from the files and the cause from the docket in cause No. 4961, on the general docket. Motion allowed.

2781. The Massillon Bridge Co., Leander F. Black et al. v. The Cambria Iron Co., Samuel B. Smath et al. Motion by plaintiff to dispend with printing record in cause No. 5316 on the general docket. Motion allowed, except as to petition, cross-petition and master's report.

2782. Philip Kiel v. Benjamin Thomas. Motion by plaintiff for leave to omit printing bill of exceptions and to extend time sixty days for printing record in cause No. 5255, on the general docket. Motion allowed by consent.

2783. Jacob Henn v. William Horn and The Board of Publication of the Evangelical Association of North America. Motion by defendant to dismiss petition in error in causes Nos. 4637 and 4638, on the general docket. Motion overruled.

2784. The State of Ohio ex rel., Attorney General v. George C. Serrill. Motion by plaintiff to advance cause No. 5222, on the general docket. Motion allowed. Plaintiff's evidence to be filed by December 15, 1896, that of defendant by January 5, 1897, and by plaintiff in rebuttal by January 15, 1897.

2785. Frank Tierney v. The State of Ohio. Motion for leave to file petition in error to the circuit court of Erie county. Motion overruled.

#### New Cases.

New cases filed in the supreme court since November 19, 1896:

5327. John J. Winn, Admr., v. Louis Drach

et al. Error to the circuit court of Hamilton county. S. J. Crawford, for plaintiff. Von Seggern, Phars & Dewald, for defendants.

5328. H. Netzorg et al. v. Daniel E. Child. Error to the circuit court of Wood county. Parker & Fries and C. H. Westenhaven, for plaintiffs. Barber & Fuller, for defendant.

3629. Daniel Henne, Guard., v. Isaac W. Snell et al. Error to the circuit court of Darke county. Elliott & Chenoworth for plaintiff. Cole, Sater, Robeson, Anderson, Bowman and Elliott Chenoworth, for defendants.

5330. The State of Ohio ex rel. Daniel B. Pearson v. Asa S. Bushnell, Governor et al. Mandamus. G. Bambach & Son, for plaintiff.

F. S. Monnett, Attorney General, for defendants.

5331. H. B. Anderson et al. v. J. M. Kirkbride et al. Error to the circuit court of Sandusky county. Jacob S. Hart, A. Shanrensfley and Garver & Garver, for plaintiffs. Frankfort & Sarver, for defendants.

5332. David Davis v. The Pittsburgh & Wheeling Coal Co. Error to the circuit court of Belmont county. Tallman & Armstrong, for plaintiff. N. K. Kennon, for defendant.

5333. The City of Wellston, Ohio, v. Thomas J. Morgan. Error to the circuit court of Jackson county. Moore & Smith, E. B. Brighton and Jas. M. Tripp, for plaintiff. J. M. McGillivray and J. W. Bannon, for defendant.

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## COMMENDATIONS.

The following selections give the pith of some of the many commendatory letters we have received from time to time. Want of space prevents our giving all the letters, and we submit these few as specimens of the whole.

A well known lawyer in northern Ohio writes:

"The **Ohio Legal News**, I believe is the best legal paper ever published in Ohio."

Another says:

"I have been a subscriber to all the other Ohio law papers published within the last thirty-five years, and am frank to say that yours is ahead of any one of them."

A leading member of the Cincinnati bar says:

"You have made hustling times with your competitor, and although you have made him improve his paper considerably, it is yet far behind yours."

An attorney of prominence at Columbus says:

"I learn that your journal is regarded by the legal profession as the leading one, and as I desire to keep up with the procession, so I send you my subscription."

A distinguished attorney in central Ohio writes:

"Allow me to congratulate you on the excellency of the **Ohio Legal News**. I consider it the best law journal in existence to-day."

A well known ex-judge, upon return to practice wrote:

"I have become in the habit of relying upon your **Legal News** to keep myself posted in the matter of current decisions, and items of news, while upon the bench, and I should be unable while in the practice to go ahead with proper assurance, if I did not subscribe for the **News**."

A retiring circuit court judge wrote us:

"You have not only set the pace for competitors, but made it so rapid that they do not appear to be in the race. I am unable to see how a lawyer can be without your paper."

Another member of the bench says:

"Containing as it does so, many of the current decisions of interest not published elsewhere, it seems impossible that a lawyer who aims at success can permit himself to go without it."

Another writes:

"I like your plan of publishing the decisions. It will be a good thing to furnish the profession with the bound volumes as rapidly as completed. I like also the good fat volumes you are publishing."

The next annual convention of the American Bar Association is to be held in Cleveland next year in the month of August. The exact date not having been determined yet.

With the issue of this week's *LEGAL NEWS* we close volume one of our *Circuit Decisions*. Advance sheets of volume two, *Circuit Decisions*, will be sent out commencing with the first issue of the *NEWS* in January.

The supreme court, late Monday evening appointed a committee consisting of Colonel J. T. Holmes, of Columbus; General J. Warren Keifer, of Springfield; Hon. John A. McMahon, of Dayton, and Hon. Elam Fisher, of Eaton, to prepare a suitable memorial on the death of the late Judge William T. Gilmore, who for many years was a member of the supreme court of this state.

The committee is to make its report to the court appointing it.

Judge Edward S. Dowell, judge of the Wayne county court of common pleas, died at his residence in Wooster Tuesday morning of last week. The deceased was fifty years old, was born in Salt Creek township, Holmes county, and was a lawyer of marked ability. At the time of his death he was serving his second term as common pleas judge, and had over one year yet to serve, his term expiring February 6, 1898. The deceased leaves a wife, a son and a daughter to mourn his loss, together with a host of sympathizing friends.

The supreme court on Tuesday afternoon heard arguments in the mandamus proceedings brought to compel Governor Bushnell to issue a certificate of election to Judge Pearson, who was recently elected by the democrats to fill a supposed vacancy on the common pleas bench in the Fifth judicial district. The governor on the advice of the attorney general, had refused, claiming no vacancy existed, despite the action of the last legislature in removing Adams county from the Fifth into the Seventh district, leaving no resident judge in the former and declaring that an election should be held to fill the vacancy created. The attorney general held that the act, so far as it made a vacancy, was unconstitutional. The supreme court upheld him in this, and Judge Collins, the present judge, who was transferred, will fill out the unexpired term.

Judge Munson, of the court of common pleas of Zanesville, gave judgment in a unique case last week, in which a lawyer of that city claimed that his client had no right to discharge him. The client, a woman, had secured the services of two lawyers to conduct a case for her, but tired of one of them and told him that she desired his counsel no longer. Whereupon the lawyer refused to go, saying that the conditions of their contract was that he should receive a fee in case the suit was won. He claimed a \$100 fee. Judge Munson decided against the lawyer.

The supreme court this week, Tuesday, handed down a decision in the case of the *Pennsylvania Railroad Company* against *Jesse Snyder*, an action upon error from the circuit court of Lucas county. The decision establishes the principle that where the employee of a railroad company, is injured through the negligence of the latter company, the employing company cannot be held liable. Snyder was a brakeman in the employ of the Lake Shore company. While working on what is known as one of the cars of the Empire Freight Line of the Pennsylvania company, in the yards of the Air Line Junction, at Toledo, November 17, 1893, he was injured by reason of a defective handhold or iron rod. Action was brought against the Lake Shore company and dismissed. He then sued the Pennsylvania company and secured a judgment of \$2,500. This was affirmed by the circuit and supreme courts.

The court also decided the case of *The City of Hamilton v. L. P. Clausen et al.*, the sewer commissioners of that city. The decision affirms the circuit court and holds to be constitutional the acts passed by the legislature providing for certain street improvements to be made at Hamilton.

The court also rendered a decision which Dr. McNeal, State Dairy and Food Commissioner, fears makes his department powerless to successfully prosecute sellers of impure drugs hereafter. The case comes from Toledo. Glen A. Emory was arrested for selling what was alleged to be impure cochineal, and the usual question arose as to what is the standard? The department insisted that the formula of the United States pharmacopœia of 1890 is the standard, but the defense raised the point that the book was not in existence at the time the pure food law was passed, and could not, therefore, be the standard.

The justice of the peace who was trying the case finally admitted the pharmacopœia of 1890 as evidence, and the defense promptly appealed to the court of common pleas. The outcome was that the justice was reversed. The case was then taken to the supreme court. Now the supreme court has overruled the decisions and seemingly established the point that the edition of 1890 cannot be made the standard of drug purity, owing to its having been published since the law became operative.

### THE DEATH PENALTY.

As the act providing electrocution of criminals is about to be put into operation, it might not be an inopportune time to make a few practical suggestions in regard to the same. It has always been a serious doubt in the writers' mind, as to whether the authority to punish with death penalty ever in fact existed in this state, if a reasonable and proper construction be placed upon section 9, article 1 of our constitution, which provides, "Excessive bail shall not be required, nor excessive fines imposed; *nor cruel and unusual* punishments inflicted." It seems clearly evident from this last clause which is copied from the federal constitution that *cruel and unusual* punishments were intended to be forbidden. Now it seems evident from the fact that the use of that language by the framers of the federal constitution, just at the time that the death penalty was so universally prevalent in France, during the reign of terror, that it was intended in this country to do away entirely with the death penalty, because it seems that nothing in the way of punishment can be considered so cruel as that which necessarily results in death. So, notwithstanding the custom it seems an opportune time to amend, and since the law providing for execution of death penalty by hanging has been repealed, and the experiment in the state of New York has demonstrated that the system of electrocution is cruel to the highest degree and has been condemned, on that account, it would be well to have the question raised and determined judicially as to whether the mode provided for is not only cruel but also unusual and on that account in violation of both the letter and spirit of the above section of the constitution. I do not think any number of wrongs can make a right, and notwithstanding the fact that capital punishment has been approved for a

century it does not make it right if such be the intent of that section of the constitution. There certainly can be no doubt but this system of electrocution is unusual, it was not even resorted to in the reign of terror when nothing seemed too cruel to be inflicted on persons charged with crime. It may be claimed that it is only meant that cruel and unusual punishments are not to be inflicted for petty offenses, but in capital cases no limitation exists. It seems this is answered by the plain provisions of the section itself as it is evident that it was intended to cover all cases whether felonies or otherwise. True the section mentions capital offenses but only in a way to forbid bail in such cases and it will be presumed that was only descriptive of the kinds of offenses as understood by common law, and was not intended to authorize the infliction of capital punishment in this country, and this is the more evident from the closing part of the section which forbids the infliction of cruel and unusual punishments. It is hoped the profession will take up this discussion with a view to moulding public sentiment in the proper shape to wholly dispense with that relic of barbarism and conform our criminal laws with both the letter and spirit of the constitution.

Yours respectfully,

D. F. REINORHL.

*Springfield O.*

### VALIDITY OF THE OHIO TORRENS LAW.

The Torrens system of registration of land titles went into effect in Ohio in September last and goes into operation in January, 1897.

No one is compelled by law to register his title in that system. If it is ever adopted to any wide extent it will be solely on its merit.

The commission which spent two laborious years in framing it, and the legislature which enacted it, believed that not only was there ample occasion for it, but that the system would commend itself to the great body of land owners and business men of the state whenever the law and the conditions that suggested it should come to be well known and understood.

It is not a newly devised system. It has been for years in successful operation in Canadian and Australian provinces, and in a limited form in Germany and England. The law in this state is designated the "Ohio Torrens System," because while on the general plan devised by Sir Henry Torrens, it is specially and carefully adapted to this state and embraces all the best

features of the system in other states, worked out through actual experience. It is not to be confounded or classed with the so called Torrens law of Illinois, which was recently and most justly pronounced unconstitutional by the supreme court. That was the Torrens law only in name. Some of the ablest jurists of the land, inside and outside of Ohio, have, after critical and adverse examination, pronounced the Ohio Torrens law not only constitutional but effective and practical. At the earliest opportunity the Ohio law, destined to so profoundly affect valuable interests, should and doubtless will be submitted in a proper case to the supreme court in order that its validity may be settled.

The purpose of the system is fourfold:

1. To afford a speedy and certain method of definitely settling the titles to such lands in Ohio as may be offered for registration.
2. To afford an easy means of removing from titles defects which may not be fatal, but which are troublesome clouds.
3. To give an absolutely indefeasible title to registered lands, actively defended by the state of Ohio.
4. To provide a method of conveying title to land with greater security, with about the same ease and at nearly as little cost as personal property may be transferred.

The land titles in Ohio wholly free from defect are very rare.

The experience of professional abstracters and legal examiners of titles shows that not more than one in ten titles is wholly free from defect. As many as seven out of every ten titles has one or more defects, which unremoved or unexplained, should in the eyes of a prudent purchaser cast a cloud upon it. About one-fourth of all titles are so defective as to be incurable, and a purchaser must take them at his risk.

As many as seven out of every ten land owners believe their titles free from defect. As a rule the less a man knows about his title the more positive he is that it is absolutely perfect. Not until a desirable sale of his land or a much-needed mortgage loan is hanging fire for full and satisfactory evidences of perfect record title, does he become enlightened on the general subject. And if he does not entirely miss his loan or lose the sale by reason of some discovered defect of title which cannot be removed, still he will have been vexed to the last degree, and injuriously delayed in clearing it up.

When a defect of title is pointed out to the

average man, and sometimes to the ordinary lawyer, it is apt to be treated as a trifling thing unworthy serious attention or business objection. There are great numbers of cases in which just such trifling errors have cut a large figure in the fortunes of those who invested in property whose title they never inquired into, or who disregarded the "trifling defects" if pointed out.

Actual cases will better serve to illustrate the point, and may put us all on inquiry.

A farm of 200 acres in central Ohio was in 1847 mortgaged by the owner, the wife joining. The mortgage not being paid at maturity was foreclosed, and in 1853 the property was sold by the sheriff, the purchaser taking a "court title," ignorantly regarded by many as a guaranty that it is full and good. But in the suit to foreclose, the wife was not made a party defendant, and so her contingent right to dower was not cut off. In 1878 the husband died. His wife, who survived him, afterward claimed and recovered her life estate in the one-third part of the property with rents and profits thereon from the date of her husband's death. The title had several times changed hands, and the property had become very valuable; but no one had thought it worth while to have the title thoroughly examined by a competent person. The probability also is, that if it had been examined, very few would have looked upon a mortgage dated in 1847 and foreclosed in 1853 as having any possible danger lurking in it.

In 1848 a tract of land of several hundred acres was conveyed by a man, non-resident, with whom no wife joined in the deed. The deed did not state whether he was married or single. In 1878 he died. The property had become valuable, had been divided and subdivided, and comprised many fine farms with beautiful homes. But no one had bothered to investigate whether this grantor when he made the deed in 1848 was married or single. As a matter of fact he was married at the date of his deed. In 1884 his widow, with a probable twenty good years of life ahead made and maintained her legal claim against all the property, with an account of one-third of the rents and profits since her husband's death.

In 1825 a married woman owning a tract of land in her own right gave birth to a daughter named Agnes and then died. The husband continued to live on the property, being entitled to his life estate therein, and in two years again married. In 1832 he sold and conveyed the property by warranty deed in fee, his then

wife joining him therein; and they with the infant Agnes moved to a distant part of the country. In those early days there was a village near the land, which in later years grew to a city, embracing this property in its central portion. It became very valuable, was subdivided, and many business blocks and residences were erected upon it. In 1883 Agnes came and asserted her absolute ownership in and right to the possession of all that land; which upon due proof the courts gave her with an account of the rents and profits thereof since the death of her father in 1873.

It is interesting to note that not one of the many owners of that property had gone to the trouble and expense of having a full, narrative abstract of title made and examined by competent counsel. For more than fifty years people had occupied that property in unquestioning security, had paid their money for a full title, had warranted it with impunity and would have been indignant at the request of a new purchaser or a money lender for proof of perfect title. Some savings banks which had loans on parts of the property were content with the simple certificate of an abstracter, who was not a lawyer, that he "had examined the record and found the chain of title good in the borrower." It is likely that not any of those people would willingly have given a dollar for complete evidence of title, much less would they have thought a Torrens system of any possible use to them.

There is not now, outside of the provisions of the Torrens system, any law, and never has been any law in Ohio, requiring record evidence to be made of who are the heirs of a deceased person and to whom his land shall descend. Purchasers of property which has thus descended must either take what they get without question, or depend on evidence outside of the public records that they are getting the interest of all the heirs.

Latent defects of title growing out of this inadequacy of the law are numerous and often turn out to be very serious.

A tract of 160 acres in a populous part of one of Ohio's largest cities was thus recently involved. The supreme court of the United States found the claim of the heir, whose title had never been obtained, good and indefeasible, although many more than twenty-one years had elapsed, and decreed that possession be given with rents and profits.

In 1841 a man living in Maryland, yet owning a large body of land in Ohio, died intestate, leaving a son and a daughter who were of age

and married, and one son Lester, an infant, less than a year old. In 1842 the elder son with his wife, and the daughter with her husband, conveyed the land by warranty in fee, describing themselves in the deed as heirs of the deceased ancestor, who had owned the land. The property was subdivided and resold and passed through numerous hands, but no purchaser took the pains to get proof that all the heirs had joined in the original deed. Thirty-seven years afterward Lester brought suit and recovered the one-third of the property; and the people who had paid out their money and spent their strength in building their homes, were remediless.

Seventy per cent of the titles not already cleared up have defects similar on their faces to some of those mentioned.

Are they all alike fatal? By no means.

But who shall know what are fatal until the defects have been investigated and removed by satisfactory evidence?

Can all those which may possibly never prove fatal be cleared up? Certainly not, except by sufficient lapse of time or the intervention of the court.

It is very apparent that a lapse of twenty-one years does not, as is commonly supposed, always and absolutely bar out all adverse claims to land titles. And who can afford to wait even that time with a threatening cloud impending over his title, imperiling the property he claims and the coming years of opportunity?

Hitherto the relief by court procedure has not been adequate because not comprehensive or immediately conclusive. In order to clear up by ordinary court proceeding a title having the average number of defects requires as a rule as many separate actions as there are defects. And when all that is done, still there is no guaranty that the title is conclusively good. With each transfer or mortgage of the land the title has to be overhauled, re-examined and recertified from the beginning.

The fundamental basis of the Ohio Torrens system is the settlement of title by a decree of court.

The Illinois law omitted the intervention of the court, and for that reason was found unconstitutional. The Ohio law is so wisely framed that in a single and simple action all that relates to or affects a man's title to his land may be investigated, and, if his title is found to be in fee, may be, at once and forever settled by the court's decree and due registration in the Torrens system.

And that is not all: the state itself gets behind and defends the title. If it shall ever be attacked by an adverse claimant—as by some undiscovered heir, whose title had neither passed nor been barred by limitation or by registration, the state does not wait for the owner to be dispossessed. He cannot be dispossessed. He has nothing further to do in the defense of his title. The state defends it. If it shall happen that an adverse claimant to registered lands shall establish his claim it is paid by the state out of the assurance fund.

For there have happened and will continue to happen cases in which all reasonable diligence may not be able to discover fatal defects in a title. Of that class are those defects which arise out of the inadequacy of the law hitherto existing for the conveyance and record of land titles, as in cases where title descends to heirs, examples of which are given above. And the titles to nearly all lands in Ohio have within the last fifty years passed, one or more times, by descent from ancestor dying intestate, to his heirs, of which no record was ever made.

There also was until recently a law of Ohio which has been, and will continue to be for years to come, a prolific source of defect in titles which may not with diligence be found out. It was the law which, until 1884, provided that no married woman could convey any title to land in Ohio unless her husband joined in the deed with her.

Recently the supreme court of the United States rendered a decree in ejectment against people who had, with their grantors, been in possession of valuable and highly improved lands in Ohio for over forty years. The chain of titles disclosed no apparent defect. There was, however, a deed made in the early part of the century in which the signature and acknowledgment of the husband was a few months subsequent to that of the wife. And therein lurked the trouble; she had died in the meantime. At her death the title to the land described in the deed descended immediately to her children subject only to the life estate of her husband therein. When he signed the deed his life estate alone was conveyed and that was the only title the guaranty obtained. The husband lived to a great age. The heirs of the wife brought their suit in ejectment within 21 years after the death of the husband and recovered the land, which had been occupied by people who had paid full consideration for it and greatly improved it as a home. It was by no fault of these people that their prop-

erty was taken; and the state through whose inadequate laws they had lost it, had no law or remedy for their relief.

It is a grievous ill that a man should thus suffer the ruin of a life work and through no fault or lack of diligence on his part. The same misfortune has happened many times in Ohio. It is liable to happen many times more.

It would be but simple justice that the state should step into the breach and not only amend the faulty law, but provide a means of safety to its land holders, still imperiled by hidden defects of title.

This it has done in the Torrens law for all who will avail themselves of its security.

The methods by which a Torrens title is conveyed from seller to buyer, or is mortgaged, are very simple and very inexpensive.

The time which it takes to find out all the various liens and incumbrances, and the full condition of the Torrens title, is about five minutes.

ALBERT HOUGHTON.

## SUPREME COURT OF OHIO.

### Official Record of Proceedings.

TUESDAY, December 1, 1896.

#### General Docket.

3594. Oliver C. Shurtz, Adm'r, v. James Colvin et al. Error to the circuit court of Muskingum county.

MINSHALL, J.

1. A vendor who takes a mortgage on the premises, including other lands of the vendee, thereby waives his lien for the purchase money.

2. Where an owner of land, under a verbal agreement for the sale of it, places the purchaser in possession and executes a deed and places it in the hands of a third person, with direction to deliver it on the purchase money being paid or secured by mortgage; and the grantee induces the holder of the deed to deliver it to him that he may exhibit as evidence of title, and the grantee does so to one ignorant of the facts, and who in good faith makes him a loan secured by mortgage on the property, the grantor in such case is estopped from setting up his claim to the land or a lien on it for purchase money, against such innocent mortgagee. Ogden v. Ogden, 4 Ohio St., 182, distinguished.

3. The rule that one who would avail himself of an estoppel must plead it, is fairly complied with, where, upon the whole case made by the pleadings, it appears that the party intends to rely on it, if certain facts averred by the other party, and denied by him for want of

knowledge, are made to appear. And in any case the rule only applies where the party has had an opportunity to plead it.

Judgment reversed and judgment on the facts found for the plaintiff in error.

3602. *Abram C. Doney v. John F. Clark, Adm'r.* Error to the circuit court of Franklin county.

SHAUCK, J.

1. By the provisions of section 6139, Revised Statutes, the administrator of an insolvent estate is a trustee for the creditors of his decedent with respect to lands conveyed by said decedent in fraud of his creditors, and he may maintain a suit to subject them to the payment of the demands of such creditors, unless the rights of a purchaser in good faith from the fraudulent grantee have intervened.

2. Such administrator may maintain an action against the fraudulent grantee to recover the value of the lands, if the latter has conveyed them to an innocent purchaser.

3. The time within which such action may be brought is not fixed by the general statute for the limitations of actions, but by the special provision of said section, which permits it to be brought within four years from the death of the fraudulent grantor.

4. On the trial of issues of fact joined in an action so brought to recover the value of the lands, either party is entitled to demand a jury.

5. The action to recover the value of the lands so conveyed "involves the validity of a deed," and the grantee is competent to testify generally under the provisions of sections 5240-2 of the Revised Statutes.

Judgments of the circuit and common pleas courts reversed.

4273. *The Cleveland, Cincinnati, Chicago and St. Louis Railway Company v. Maggie Kernochan, admx.* Error to the circuit court of Crawford county.

BRADBURY, J.

1. One who engages in a hazardous employment assumes all risks incident thereto; but is not bound to anticipate such dangers connected therewith, as arise solely from the negligence of others, not in law his fellow servants; and therefore his failure to foresee and guard against dangers of the latter class, does not arise against him, nor his personal representatives, a presumption of contributory negligence.

2. An entry in the following terms: "This day came the defendant and filed its bill of exceptions, duly allowed, signed and sealed, and the same at its request is ordered to be made a part of the record in this case, all of which is done within the fifty days allowed," made on the journal of a court of common pleas, shows with sufficient certainty that the bill of exceptions therein referred to was presented to and signed, sealed and allowed by the trial judge.

3. Where, in a proceeding in error in a circuit court, the bill of exceptions is the predi-

cate of a number of distinct assignments of error, one of which is that the verdict and judgment are against the weight of the evidence—it being the special province of the circuit court of this state to consider and determine that question—the plaintiff in error is entitled, of right, to a decision of the circuit courts thereon. Should that court erroneously dismiss, or erroneously decline to consider, a bill of exceptions on the ground that it had not been legally allowed, and thereupon affirm the judgment below, such judgment of affirmation will be reserved by this court, without passing on any question arising out of the bill of exceptions, and the cause remanded to the circuit court with instructions that it consider and decide all questions that may arise out of the same.

Judgment reversed and cause remanded.

4364. *The village of Bellefontaine v. Louis Vassaux.* Error to the circuit court of Logan county.

SPRACK, J.

1. A judgment of conviction by a mayor, of an offense made punishable by a village ordinance, is reviewable upon questions of law, but not upon the weight of the evidence.

2. The general rule is that title to goods intended to be transported passes from the vendor to the purchaser upon delivery by the former to a common carrier consigned to the purchaser, whether paid for or not. But if the vendor consigns the goods nominally to the purchaser, but actually in care of his own storekeeper, who is to retain them in control and give possession to the purchaser only on payment of the purchase price, then the delivery to the common carrier, is not, in law, delivery to the purchaser.

3. Under such circumstances, the shipment being in effect to the vendor himself, the delivery, when it occurs, would be at the store house of the vendor; and the transaction would not be a completed sale at the point of shipment.

4. As a general rule, a sale of personal property is not completed when anything remains to be done to identify the thing sold, or discriminate it from other like things.

Judgment reversed.

3689. *The Standard Oil Company v. George G. Snowden, assignee, et al.* Error to the circuit court of Cuyahoga county.

BURKET, J.

Upon completion of a structure, three notes were taken by the contractors from the owner, for the balance due, which notes were indorsed and sold to a bank, and within four months after the completion of the structure, and while the bank was the owner and holder of the notes, the contractors made and filed with the county recorder an affidavit in due form for perfecting a mechanic's lien to secure the indebtedness for erecting the structure. Held, that such lien is valid.

Judgment affirmed.

4949. *Pennsylvania Railroad Company v.*

Jesse Snyder. Error to the circuit court of Lucas county.

WILLIAMS, C. J.

1. Where companies controlling connecting lines of railway transport over their respective lines loaded freight cars of the other, under a traffic arrangement by which they share the earnings, and one company delivers to the other to be transported over its line a car that is so defective in its equipments as to be dangerous to handle, which should have been inspected and repaired before being so delivered, and in consequence of such defective condition of the car an employee of the latter company receives an injury while handling it in the course of his employment, the negligence of the former company in delivering the car for transportation without proper inspection and repair is the proximate cause of the injury, although the employer company should also have made an inspection of the car when it was received, and was negligent in that duty; the negligence of the latter company, while contributing to produce the injury, is not an independent cause breaking the causal connection between the injury and original negligence of the company furnishing the car for transportation; and either company, or both, may be held responsible at the election of the party injured.

2. The company delivering the car to the other company should have anticipated that employees of the latter would go upon and handle the car and thereby be exposed to the danger of receiving injury, as a natural and probable consequence of its defective condition, and owed such employees a duty to use reasonable care to discover and remove its dangerous defects before it was so delivered. The services of such employees being necessary to accomplish the transportation intended, the delivery of the car for that purpose amounted to an invitation to them to go upon and handle the car in the course of their employment, and an assurance that they could safely do so.

3. When a person without his faults, is placed in a situation of danger, he is not to be held to the exercise of the same care and circumspection that prudent persons would exercise where no danger is present; nor can it be said that, as matter of law, he is guilty of contributory negligence because he fails to make the most judicious choice between hazards presented, or would have escaped injury if he had chosen differently. The question in such case is not what a careful person would do under ordinary circumstances, but what would he be likely to do, or might reasonably be expected to do in the presence of such existing peril, and is one of fact for the jury.

Judgment affirmed.

5274. The State of Ohio v. Glen A. Emery. Exceptions by the prosecuting attorney to the ruling of the court of common pleas of Lucas county.

BY THE COURT.

1. The reference in section 3, of the pure

drug statute (87 Ohio Laws, 248), to the United States Pharmacopoeia, is to the edition in general use when the statute was enacted, which was that of 1880.

2. The sale of a drug which was equal to the standard of strength quality and purity laid down in that edition, is not rendered unlawful because it is, below a higher standard laid down in a subsequently revised edition, though that edition was in general use when the sale was made.

3. A copy of the subsequent revised edition is not competent evidence in the trial of a prosecution under the statute.

Exceptions overruled.

3696. Hiram D. Peck, admr., etc., v. Peter Cavagna. Error to the general term of the superior court of Cincinnati. Judgment affirmed.

3701. Mattie S. Kirby et al. v. Daniel D. Dowdle et al. Error to the circuit court of Hamilton county. Judgment affirmed.

3726. The B. & O. R. Co. v. Esther Griffith, admx. Error to the circuit court of Licking county. Judgment affirmed.

3961. W. H. Mandeville et al. v. Diarica A. Dye. Error to the circuit court of Washington county. Judgment affirmed.

4386. The American Express Co. v. Irvin H. McPherson. Error to the circuit court of Miami county. Judgment affirmed.

4446. Charles Reiter v. The State of Ohio ex rel. Rosa Reiter. Error to the circuit court of Putnam county. Judgment affirmed.

5052. The City of Hamilton v. L. P. Clawson et al. Error to the circuit court of Butler county. Judgment affirmed.

5274. State of Ohio v. Glen A. Emery. Exceptions to the prosecuting attorney to the court of common pleas of Lucas county. Exceptions overruled. Per curiam report.

5232. Elisha Garrison et al. v. Rufus K. Betts. Error to the circuit court of Ross county. Dismissed for failure to file printed record.

5234. F. L. Allen, Receiver, v. A. J. Douds. Error to the circuit court of Portage county. Dismissed for failure to file printed record.

5330. The State of Ohio ex rel. David V. Peason v. Asa S. Ryshnell, Governor et al. Mandamus. Demurrer to petition sustained and writ refused.

#### New Cases.

New cases filed in the supreme court since November 25, 1886:

5334. Hutsin P. McGhee et al. v. George W. Poor, Auditor. Error to the circuit court of Jackson county. James M. Tripp, for plaintiffs in error. T. A. Jones, for defendant.

5335. I. B. Poyer, Guardian, v. Jacob Hornig et al., Ex'rs. Error to the circuit court of Erie county. C. P. Wickham, for plaintiff. H. W. Peck, for defendants.

# Ohio Legal News.

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## COMMENDATIONS.

The following selections give the pith of some of the many commendatory letters we have received from time to time. Want of space prevents our giving all the letters, and we submit these few as specimens of the whole.

A well known lawyer in northern Ohio writes:

"The Ohio Legal News, I believe is the best legal paper ever published in Ohio."

Another says:

"I have been a subscriber to all the other Ohio law papers published within the last thirty-five years, and am frank to say that yours is ahead of any one of them."

A leading member of the Cincinnati bar says:

"You have made hustling times with your competitor, and although you have made him improve his paper considerably, it is yet far behind yours."

An attorney of prominence at Columbus says:

"I learn that your journal is regarded by the legal profession as the leading one, and as I desire to keep up with the procession, so I send you my subscription."

A distinguished attorney in central Ohio writes:

"Allow me to congratulate you on the excellency of the Ohio Legal News. I consider it the best law journal in existence to-day."

A well known ex-judge, upon return to practice wrote:

"I have become in the habit of relying upon your Legal News to keep myself posted in the matter of current decisions, and items of news, while upon the bench, and I should be unable while in the practice to go ahead with proper assurance, if I did not subscribe for the News."

A retiring circuit court judge wrote us:

"You have not only set the pace for competitors, but made it so rapid that they do not appear to be in the race. I am unable to see how a lawyer can be without your paper."

Another member of the bench says:

"Containing as it does so many of the current decisions of interest not published elsewhere, it seems impossible that a lawyer who aims at success can permit himself to go without it."

Another writes:

"I like your plan of publishing the decisions. It will be a good thing to furnish the profession with the bound volumes as rapidly as completed. I like also the good fat volumes you are publishing."

Ex-judge Patrick Mallon, one of the elder members of the Cincinnati bar, died at his home Tuesday of this week.

A test case is to be brought against the city of Urbana, in which it will be sought to test the law authorizing that city to issue bonds for the purpose of bringing natural gas to the city.

The trial of Ex-Senator Gear, of Upper Sandusky, who was charged with having solicited a bribe, was brought to a close Wednesday afternoon, and resulted in an acquittal, the jury being out only one hour.

Governor Bushnell on Monday afternoon of this week, announced the appointment of Frank Taggart, of Wooster, for common pleas judge for the third subdivision of the sixth judicial district. Mr. Taggart takes the place of Judge E. S. Dowell, deceased. He is a graduate of Wooster University, and has been engaged in the practice of law for the past twenty years.

A rather novel and unprecedented proceeding was recently instituted in the Cuyahoga court of common pleas, in which the administrator of the estate of a deceased wife, who had been murdered by her husband, brought suit against the administrator of the estate of the deceased husband for \$10,000 damages for the unlawful killing of his wife. The case was tried before the jury in Judge Stone's room, which rendered a verdict for \$3,000, in favor of the administrator of the estate of the deceased wife.

The circuit court of the fifth circuit, sitting in Perry county, Wednesday of this week, in the case of *Manly L. McGee v. the PerCoun ty Oil Co., et al.*, on appeal from the common pleas, held, the Mechanic's Lien law unconstitutional; following the case of *Palmer & Crawford v. Tingle*, 3 O. D., 573, and which was affirmed by the supreme court this week. No lengthy opinion was given. the court simply announced that it would follow the case in 3, O. D., 573, as it believed the act as amended April 13, 1894, in 91 O. L., page 135, was contrary to the spirit of sections 1 and 2, of the Bill of Rights.

In the mandamus suit of Dr. W. A. France against the state board of medical registration and examination, which was submitted to Judge Badger, of Columbus, the judge upon a demurrer to the petition and alternative writ, overruled the demurrer and gave the board until December 26, to answer. In rendering his decision the judge said: "Mandamus may be awarded for the purpose of requiring officers to proceed to act upon matters required by law to be acted upon by them. The question as to whether a court will interfere by a mandamus after the board has acted in a case and exercised its judgment and finally disposed of the case, is not now before the court and is not passed on by the court. The board in this case, according to the averments of the petition, have neglected to act, and it is quite clear that a court of equity may grant mandamus to put the discretion of such a board into motion."

#### MECHANIC'S LIEN LAW.

A decision of great importance was handed down by the supreme court this week, by which the mechanic's lien law passed three years ago, was declared unconstitutional. The case in which this question was raised and decided was that of *Palmer & Crawford v. William C. Tingle*, which came to the supreme court on error from the circuit court of Putnam county. The decision is understood to apply to material men only, and is based on the doctrine that a man cannot be made a party to a contract without his consent, and that the claim of the man who has sold the material to a contractor, is not good as against the owner of the premises, because the latter's consent was not received to the contract.

#### THE NICHOLS LAW.

The state of Ohio has practically won a victory in the United States supreme court regarding the Nichols law. The so-called Nichols law tax cases were taken up by the supreme court Thursday. The attorneys for the Western Union Telegraph company offered to settle with the state of Ohio, providing that the state would accept in settlement an amount somewhat less than that claimed by the state, but this proposition was declined; and when the court convened on Thursday morning, attorney Maxwell, representing the Western Union, rose to address the court, offering a

motion to dismiss the appeal so far as the Western Union was concerned, which motion the court granted.

This action of the Western Union is far reaching in its effect, as by it the constitutionality of the Nichols law is conceded and it will therefore stand for all time, and by it, also, the state of Ohio wins in the court of last resort in its suits against the Western Union, and that corporation will have to pay in taxes, the aggregate amount of \$220,000, which includes the taxes for four years.

After the settlement of the cases against the Western Union, the cases against the various express companies were taken up. A decision in these cases will be reached sometime next week.

### THE DEATH PENALTY.

[Communication to Ohio Legal News.]

In your publication of December 5, on page 63, is an article on "THE DEATH PENALTY," by Mr. D. F. Reinoehl, of Springfield, Ohio.

The spirit of Mr. Reinoehl's remarks is commendable, and, I am sure, worthy of most serious consideration. A little lapse in one of his historical allusions, however, should not go unnoticed.

Commenting upon the source of the clause, "cruel and unusual punishment," found in sec. 9, art. 1, of our state constitution, he refers it, properly enough, to the federal constitution, 8th amend.

Discussing further, he goes on to say: "Now it seems evident from the fact that the use of that language (referring to the clause, 'cruel and unusual punishment,' found in the 8th amend of the federal constitution) by the framers of that document, just at the time that the death penalty was so universally prevalent in France, during the reign of terror, that it was intended in this country to do away with the death penalty," etc., etc.

Now as to the possibly misleading character of the passage quoted, it is worth while to note, first, that the framers of the federal constitution met and accomplished their historic task during the year 1787; second, that the first ten amendments were proposed by congress, Sept. 25, 1789, and were ratified not later than Dec. 15, 1791; third, that nearly all the popular excess of the French people came at a date later than Dec., 1791, and "The Reign of Terror" specifically mentioned by Mr. Reinoehl, was in 1793.

If this particular anachronism had not been brought to my attention the second time during the last few years, and each time in a creditable journal, I should not have taken the trouble to correct it.

Very truly yours,

B. F. MAIDEN.

MARIETTA, OHIO, Dec. 7, 1896.

### GETTING EVEN WITH THE LAWYERS.

A magistrate was dealing with a vagrant, and in a severe tone addressed him thus: "You have been up before me half a dozen times this year," thereby giving him to understand he had appeared too often on the scene. The prisoner, however, was equal to the occasion, for he replied: "Come, now, Judge, none of that. Every time I've been here I've seen you here. You are here more than I am. People who live in glass houses shouldn't throw stones."

Curran, the Irish advocate, was one day examining a witness, and failing to get a direct answer said: "There is in nouse asking you questions, for I see the villian in your face." "Do you, sir?"

said the man with a smile. "Faix, I never knew before that my face was a looking glass."

"Prisoner at the bar," said the judge, is there anything you wish to say before sentence is passed upon you?" The prisoner looked toward the door and remarked that he would like to say "good evening," if it was agreeable to the company.

"I remember" said Lord Eldon, "Mr. Justice Gould tried a case at York, and when he had proceeded for about two hours he observed: 'Here are only eleven jurymen in the box; where is the twelfth?' 'Please you, my lord,' said one of the eleven, 'he has gone away about some business, but he has left his verdict with me.'"—*Chambers' Journal*.

### HOW CASES ARE DECIDED.

The way cases are considered and disposed of by the supreme court of the United States was described by Mr. Justice Brewer in the course of his response to a toast at a banquet given by the bar of the sixth federal circuit at Cincinnati, October 3, 1896. On this point he said:

"In my intercourse with the members of the bar I have found to my great surprise that the impression prevails with some that cases, after being submitted, are divided among the judges,

and that the court bases its judgment in each one wholly upon the report made by some one judge to whom that case has been assigned for examination and report. I have met with lawyers who actually believed that the opinion was written before the case was decided in conference, and that the only member of the court who fully examined the record and briefs was the one who prepared the opinion.

"It is my duty to say that the business in our court is not conducted in any such mode. Each justice is furnished with a printed copy of the record, and with a copy of each brief filed, and each one examines the records and briefs at his chambers before the case is taken up for consideration. The cases are thoroughly discussed in conference—the discussion in some being necessarily more extended than in others. The discussion being concluded—and it is never concluded until each member of the court has said all that he desires to say—the roll is called, and each justice present and participating in the decision votes to affirm, reverse, or modify, as his examination and reflection suggest. The chief justice, after the conference, and without consulting his brethren, distributes the cases so decided for opinions. No justice knows, at the time he votes in a particular case, that he will be asked to become the organ of the court in that case; nor does any member of the court ask that a particular case be assigned to him.

"The next step is the preparation of the opinion by the justice to whom it has been assigned. The opinion, when prepared, is privately printed, and a copy placed in the hands of each member of the court for examination and criticism. It is examined by each justice, and returned to the author, with such criticisms and objections as are deemed necessary. If these objections are of a serious kind, affecting the general trend of the opinion, the writer calls the attention of the justices to them, that they may be passed upon. The author adopts such suggestions of mere form as meet his views. If objections are made to which the writer does not agree, they are considered in conference, and are sustained or overruled as the majority may determine. The opinion is reprinted so as to express the final conclusions of the court, and is then filed.

"Thus, you will observe, not only is the utmost care taken to make the opinion express the view of the court, but that the final judgment rests, in every case decided, upon the examination by each member of the court of the record and briefs. Let me say that, during

my entire service in the supreme court, I have not known a single instance in which the court has determined a case merely upon the report of one or more justices as to what was contained in the record and as to what questions were properly presented by it. When you find an opinion of the court on file, and published, the profession have the right to take it as expressing the deliberate views of the court, based upon a careful examination of the records and briefs by each justice participating in the judgment.—*Case and Comment.*

### NEW JUDGES.

Following is a complete list of judges elected on November 3. Judges that were re-elected are designated by having a star prefixed to their names:

#### SUPREME COURT.

\*Marshall J. Williams, Washington C. H.

#### CIRCUIT COURTS.

\*Peter F. Swing, Batavia, 1st circuit.

\*Harrison Wilson, Sidney, 2d circuit.

Caleb H. Norris, Marion, 3d circuit.

Hiram L. Sibley, Marietta, 4th circuit.

S. M. Douglas, Mansfield, 5th circuit.

\*Geo. R. Haynes, Toledo, 6th circuit.

\*Jerome B. Burrows, Painesville, 7th circuit.

\*H. J. Caldwell, Cleveland, 8th circuit.

#### COMMON PLEAS COURTS.

David Davis, Cincinnati, 1st district.

Ferdinand Jelke, jr., Cincinnati, 1st district.

Jno. P. Murphy, Cincinnati, 1st district.

Samuel W. Smith, jr., Cincinnati, 1st district.

Frederick S. Spiegel, Cincinnati, 1st district.

John F. Neilan, Hamilton, 2d district, 1st subdivision.

\*Theodore Sullivan, Troy, 2d district, 2d subdivision.

Owen Brett Brown, Dayton, 2d district, 3d subdivision.

Alvin W. Kumler, Dayton, 2d district, 3d subdivision.

\*Milton Clark, Lebanon, 2d district, 3d subdivision.

William H. Hubbard, —, 3d district, 2d subdivision.

S. A. Wildman, Norwalk, 4th district, 1st subdivision.

Linn W. Hull, Sandusky, 4th district, 1st subdivision.

Jason A. Barber, Toledo, 4th district, 1st subdivision.

\*David J. Nye, Elyria, 4th district, 2d subdivision.

F. E. Dellenbaugh, Cleveland, 4th district, 3d subdivision.

Jno. M. Markley, ———, 5th district, 1st subdivision.

\*Cyrus Newby, Hillsboro, 5th district, 2d subdivision.

Thos. M. Biggar, Columbus, 5th district, 3d subdivision.

John D. Jones, ———, 6th district, 1st subdivision.

Emmett M. Wickham, Delaware, 6th district, 1st subdivision.

\*Norman M. Wolfe, Mansfield, 6th district, 1st subdivision.

Jno. L. Maxwell, ———, 6th district, 3d subdivision.

\*Tall Slough, Lancaster, 7th district, 1st subdivision.

Oliver W. H. Wright, ———, 7th district, 1st subdivision.

\*Henry Collings, Manchester, 7th district, 2d subdivision.

John C. Wilner, ———, 7th district, 2d subdivision.

Joseph M. Wood, ———, 7th district, 3d subdivision.

\*Wm. Chambers, Caldwell, 8th district, 1st subdivision.

\*William B. Crew, McConnellsville, 8th district, 1st subdivision.

Jno. W. Hollingsworth, ———, 8th district, 2d subdivision.

Jno. A. Mansfield, Steubenville, 8th district, 3d subdivision.

\*Fletcher Douthitt, New Philadelphia, 8th district, 3d subdivision.

\*Thomas T. McCarty, Canton, 9th district, 1st subdivision.

P. M. Smith, Wellsville, 9th district, 1st subdivision.

Jas. B. Kennedy, Youngstown, 9th district, 2d subdivision.

\*Wm. P. Howland, Jefferson, 9th district, 1st subdivision.

James C. Tobias, ———, 10th district, 2d subdivision.

Duncan Dow, Bellefontaine, 10th district, 3d subdivision.

#### SUPREME COURT PROCEEDINGS.

TUESDAY, *December 8, 1896.*

#### General Docket.

4228. The P., C., C. & St. L. Ry. Co. v. James G. Reynolds. Error to the circuit court of Warren county.

MINSHALL, J.

Where a person has a ticket purchased from a company engaged in the business of a common carrier of passengers, entitling him to be carried from a certain station to another on the line of its road, and is good only on trains stopping at his destination, is by the fault of the company's station agent, induced to take a train that does not, under its schedule, stop at such place, and as a consequence, is ejected by the conductor on calling for his ticket and before reaching his destination, such facts show a right in the passenger against the company to recover as for a tort, and not merely for a breach of contract.

Judgment affirmed.

5284. State of Ohio ex rel. Thomas G. Fitzsimons v. Samuel M. Taylor, Secretary of State. In Mandamus.

SHAUCK, J.

1. It is the imperative duty of the secretary of state, as state supervisor of elections, to send to the deputy supervisors the form of ballot to be used at an approaching election immediately upon the expiration of the time allowed for correcting certificates of nomination.

2. The secretary, having rightly performed that duty, properly refused to instruct the deputy supervisors to omit from the ticket the name of a candidate who subsequently withdrew, there being no nomination to fill the vacancy.

Writ refused.

4627. The City of Galion v. William Lauer. Error to the circuit court of Crawford county. BRADBURY, J.

1. In an action against a municipal corporation to recover for injuries caused by a defective sidewalk, evidence that the plaintiff was married and had a family of small children depending on him for support, is incompetent. The tendency of such evidence is to enhance the damages beyond the sum legally recoverable.

2. Whether or not a presumption would arise from such evidence, alone, that the verdict had been affected thereby, and the evidence therefore prejudicial; yet such presumption should be held to exist where in such case the court said in its charge that the jury, in estimating the damages, might, among other matters, consider the ability of the plaintiff "to labor and earn money \* \* \* and provide for himself and family before and after the accident."

Judgment reversed.

3880. The Stranahan Catering Co. v. Frank R. Coit. Error to the circuit court of Portage county.

SPEAR, J.

1. A master is liable for the malicious acts of his servant whereby others are injured, if

the acts are done within the scope of the employment and in the execution of the service for which he was engaged by the master.

2. Where a master owes to a third person the performance of some duty, as to do or not to do a particular act, and commits the performance of the duty to a servant, the master cannot escape responsibility if the servant fails to perform it whether such failure be accidental or willful, or whether it be the result of negligence or malice. Nor is the case altered if it appear that the malice was directed to the master,

3. Where a master is under contract to deliver to the proprietor of a cheese and butter factory, pure milk, and has knowledge that the milk so delivered is to be mixed with the milk of other patrons, and intrusts the delivery to a servant who, in the course of such employment, delivers adulterated milk, the master is liable for damages necessarily and directly resulting by reason of such delivery, and it is not a defense to show that the servant, without authority and purposely, and to gratify his malice towards his employer, and with intent to injure him, adulterated the milk so delivered by mixing it with water, and that the master had no knowledge of such adulteration. In such case the rule of damages is compensation for the injury.

Judgments reversed and cause remanded.

BRADBURY, J., dissents.

4839. *Palmer & Crawford v. William C. Tingle*. Error to the circuit court of Putnam county.

And—

4958. *L. F. Young v. The Lion Hardware Company*. Error to the circuit court of Clark county.

BURKET, J.

1. The inalienable right of enjoying liberty and acquiring property, guaranteed by the first section of the bill of rights of the constitution, embraces the right to be free in the enjoyment of our faculties, subject only to such restraints as are necessary for the common welfare.

2. Liberty to acquire property by contract, can be restrained by the general assembly only so far as such restraint is for the common welfare and equal protection and benefit of the people, and such restraining statute must be of such a character, that a court may see that it is for such general welfare, protection and benefit. The judgment of the general assembly in such cases is not conclusive.

3. While a valid statute regulating contracts, is, by its own force, read into, and made a part of, such contracts, it is otherwise as to invalid statutes.

4. The act of April 13th, 1894, 91 O. L., 135, in so far as it gives a lien on the property of the owner to subcontractors, laborers, and those who furnish machinery, material, or tile to the contractor, is unconstitutional and void. All to whom the contractor becomes indebted

in the performance of his contract, are bound by the terms of the contract between him and the owner.

Judgment of the circuit court of Putnam county affirmed, and that of Clark county reversed.

MINSHALL, J., dissents.

4429. *Lewis Meler & Co. et al. v. First National Bank of Cardington et al.* Error to the circuit court of Franklin county.

WILLIAMS, C. J.

1. A promissory note signed by all the members of a copartnership, when given for a consideration received by the firm, is as effectual to create a partnership debt as if signed in the firm name.

2. The recovery of a judgment against the makers, on such a note, does not extinguish the partnership liability, nor exclude the creditor from participation in the distribution of the effects of the firm, in case of its insolvency, among the partnership creditors.

3. Equity will look behind the form of a judgment, and inquire into the nature of the demand on which it is founded, and the relation of the parties, when necessary for the preservation of equitable rights.

4. The provision of section 5382, of the Revised Statutes, which forbids preference among executions against the same debtor, sued out during the term in which the judgment was rendered, or within ten days thereafter, applies only to executions sued out on judgments of the same court.

5. The rule of equality established by that provision is not defeated or affected by the invention of another lien having legal priority over the judgments and executions that are subsequent to such lien; if the amount of money made, is insufficient to satisfy all the executions, the whole amount applicable to each and all of them, must, notwithstanding such intervening lien, be distributed to all the execution creditors, in proportion to the amounts of their respective demands.

Judgment reversed and judgment for plaintiffs in error.

3520. *The State of Ohio ex rel. Attorney General v. The People's Industrial Fire Association of Cincinnati, Ohio*. In Quo Warranto. Judgment for defendant.

3743. *John Corrigan v. David H. Kimberly, Treas.* Error to the circuit court of Cuyahoga county. Judgment affirmed.

3754. *Lillian Burnett et al. v. Mary M. Felt*. Error to the circuit court of Summit county. Judgment affirmed.

3756. *L. E. Stevens v. John C. Wheeler*. Error to the circuit court of Huron county. Judgment affirmed.

3773. *Thomas H. Wells v. The Lawrence Railroad Co.* Error to the circuit court of Mahoning county. Judgment affirmed.

3789. *John Ream et al. v. Peter Ramlow et al.* Error to the circuit court of Franklin county. Judgment affirmed on the authority of *Dengenhart v. Cracraft* (36 Ohio St., 549).

3791. The Baltimore & Ohio Southwestern Railroad Company v. Charles Ault. Error to the circuit court of Ross county. Judgment of the common pleas reduced to \$100 with interest from the date of its rendition. In other respects the judgment of the circuit court is affirmed.

3793. Charles G. Hickox, Adm'r, etc. v. J. C. Shields, Treasurer. Error to the circuit court of Cuyahoga county. Judgment affirmed on the authority of Gager, Treas., v. Prout et al., 48 Ohio St., 89, and Probasco v. Raine, Auditor, 50 Ohio St., 378.

3811. C. Dieringer v. Carlisle Building & Loan Co. Error to the general term of the superior court of Cincinnati. Judgment affirmed.

4988. The Findlay Street Railway Co. v. The City of Findlay. Error to the circuit court of Hancock county. Judgment of the circuit court, as to the 1st, 2nd and 3rd causes of action, reversed, and that of the common pleas affirmed, and as to the 4th cause of action, judgment of the circuit court is affirmed. Burket, J., not sitting.

5227. Jacob C. Halm et al. v. Henry A. Brown. Error to the circuit court of Williams county. Dismissed by consent of parties at costs of plaintiffs in error.

#### Motion Docket.

2719. George Polley et al., Adm'r, v. Elizabeth A. Hicks. Motion by defendant to strike bill of exceptions from files and to dismiss cause No. 5032, on the general docket. Motion overruled. Questions raised may be submitted on final hearing of the case.

2720. George Polley et al., Adm'r, v. Elizabeth A. Hicks. Motion by John Hicks, one of the plaintiffs in error to dismiss cause No. 5032 on the general docket. Motion overruled. Questions raised may be submitted on the final hearing of the case.

2786. Mark Hutchinson v. Robert H. Jenks et al. Motion by plaintiff to reinstate cause No. 4554 on the general docket. Motion allowed.

2787. John G. Haver et al. v. J. E. Williams. Motion by plaintiffs to reinstate cause No. 4553 on the general docket. Motion allowed.

2788. Mary S. Black et al. v. William B. Hiatt et al. Motion by plaintiffs to reinstate cause No. 4552 on the general docket. Motion overruled.

2789. The Lawrence Furnace Co. v. The Trustees of Original Survey, Township 2, Range 18. Motion by plaintiff to reinstate cause No. 4503 on the general docket. Motion allowed by consent.

2790. The State of Ohio v. James G. Lowe. Motion for leave to file a petition in error to the circuit court of Washington county. Motion allowed and cause advanced.

2791. Joseph Pfitzer v. The C., C., C. & St. L. Ry. Co. et al. Motion by plaintiff for temporary injunction in cause No. 5344 on the general docket. Motion overruled.

2792. The State of Ohio v. John Ruedy. Motion by plaintiff for leave to file a bill of exceptions to the court of common pleas of Portage county. Motion allowed and cause advanced.

#### New Cases.

New cases filed in the supreme court since November 25, 1896.

5336. James Reed et al. v. The State of Ohio ex rel. Thomas J. McDermott, etc. Error to the circuit court of Muskingum county. L. E. Dodd, F. S. Gates and H. P. Willey, for plaintiffs. Thomas J. McDermott, for defendant.

5337. Levi L. Dunlavy v. The Dennison Deposit Bank and Edward M. Bailey as Assignee. Error to the circuit court of Tuscarawas county. Lusk & Ronig, for plaintiff.

5338. John M. Curry et al. v. William Kohler et al. Error to the circuit court of Tuscarawas county. Lusk & Ronig, for plaintiffs.

5339. Walter J. Lockwood et al. v. Elizabeth S. Marvin et al. Error to the circuit court of Erie county. Bentley & Stewart, Stewart & Rowley and Andrews Bros., for plaintiffs. R. M. Lockwood, Horace Andrews and A. Phinney, for defendants.

5340. The C., H. & D. R. R. Co. v. Ella Hickey, Adm'r. Error to the circuit court of Lawrence county. R. D. Marshall, for plaintiff. E. F. Williams and A. J. Johnson, for defendant.

5341. The Bellaire, Bridgeport and Martin's Ferry Street Ry. Co. v. Martha E. Smith. Error to the circuit court of Belmont county. J. C. Heinlein, for plaintiff. W. B. Francis, for defendant.

5342. Emil Lehrke et al. v. C. I. Taylor, president, etc., et al. Error to the circuit court of Cuyahoga county. Wilson & David, for plaintiffs.

5343. The Northwestern Ohio Natural Gas Co. v. The City of Tiffin et al. Error to the circuit court of Hancock county. Doyle & Lewis and H. F. Burket, for plaintiff; Lutes & Lutes and J. A. & E. U. Bope, for defendants.

5344. Joseph Pfitzer v. The C. C. C. & St. L. Ry. Co. et al. Error to the circuit court of Hamilton county. H. P. Lloyd and Joseph W. O'Hara, for plaintiff; Harmon, Colston, Goldsmith & Hoadly, Frank F. Finamore and D. Thu. Wright, for defendants.

5345. William L. Phillips, Exr., v. Myrtle S. McConica, Guardian. Error to the circuit court of Morrow county. McConica & Banker and S. C. Kingman, for plaintiff; L. K. Powell and J. A. Garver, for defendant.

5346. Florence Hoffman, Exr., et al. v. The Traveling Men's Beneficial Association, etc. Error to the circuit court of Montgomery county. Gottschall & Crawford, for plaintiffs; Dickson & Clark, for defendant.

5347. Curtis T. Johnson, Admr., v. Alice H. Tucker et al. Error to the circuit court of Lucas county. Seney & Johnson & Trieman, for plaintiff.

5348. Lewis Hobletz et al. v. T. D. Crocker. Error to the circuit court of Cuyahoga county. Carpenter & Young, for plaintiffs.

5349. Merchant Carter et al. v. Joseph Day. Error to the circuit court of Richland county. W. L. Sewell & Cummings and McBride, for plaintiffs; Donnell, Marriott, and Bradford and Morehouse, for defendant.

5350. The Ohio Oil Co. v. Thomas A. Law. Error to the circuit court of Auglaize county. Layton & Stuve and Wheeler & Price, for plaintiff; Goeke & Culiton, for defendant.

5351. The Ohio Oil Co. vs. Delilah M. Swergart. Error to the circuit court of Auglaize county. Layton & Stuve and Wheeler & Price, for plaintiff; Goeke & Culiton, for defendant.

New cases filed in the supreme court since December 2, 1896.

5352. State of Ohio ex rel. James Ray Stellings v. Asa S. Bushnell, Governor. Mandamus. Dan. J. Ryan, for plaintiff.

5353. The Village of Dennison, Ohio v. Ouney Daugherty. Error to the circuit court of Tuscarawas county. T. H. Loller, for plaintiff. Healea & Green, for defendant.

5354. The City of Fremont, Ohio, v. W. V. B. Ames. Error to the circuit court of Sandusky county. James Hunt, for plaintiff. Bartlett & Wilson for defendant.

5355. H. A. Williams v. Henry Stearns et al. Error to the circuit court of Crawford county. L. C. Feighner, for plaintiff. R. V. Sears and Harris & Monnett, for defendants.

5356. James C. Bolon v. Cephas W. Starr. Error to the circuit court of Belmont county. O. J. Howard, for plaintiff. J. W. Walton, for defendant.

5357. The B. & O. R. R. Co. v. Walker Fulton, Admr. Error to the circuit court of Belmont county. J. H. Collins, for plaintiff. A. G. & W. Mitchell, for defendant.

5358. James R. Todhunter v. James Priddy. Error to the circuit court of Fayette county. Post & Reid, for plaintiff. Joseph Hidey, for defendant.

5359. Rueben Rankins, Admr, v. Mary Claine et al. Error to the circuit court of Fayette county. Post & Reid, for plaintiff. H. H. Sanderson and Humphrey Jones, for defendants.

5360. Adelia Morris v. Harriet Woodbunn. Error to the circuit court of Columbiana county. A. G. Smith and A. H. Clark, for plaintiff. J. H. Brooks and J. G. Moore, for defendant.

5361. Earl Brocket, a Minor, et al. v. Freeman Gates, Exr. et al. Error to the circuit court of Cuyahoga county. A. J. Michael and C. E. Penneville for plaintiffs. G. H. Foster and W. W. Boynton, for defendants.

5362. William E. Allen v. William E. Russell et al. Error to the circuit court of Summit county. Tebbals & Frank, for plaintiff. Musser & Kohler; G. M. Anderson and Tibbitt & Frank, for defendants.

5363. Jacob Kramer v. Mahlon C. Rouch et al. Error to the circuit court of Wayne county. John McSweeney, for plaintiff. Mahlon C. Rouch and M. L. Smyser, for defendants.

5364. Jirdena Conner v. Frank Conner et al., Guard., et al. Error to the circuit court of Fayette county. D. I. Worthington and H. M. Daugherty and Nye Gregg, for plaintiff. Post & Reid, for defendants.

5365. Harry Silverman et al. v. Levi Hey. Error to the circuit court of Cuyahoga county. W. C. Rogers, for plaintiffs. Emil Joseph for defendant.

5366. The State of Ohio ex rel. Sidney Moore v. Cyrus B. Adams, Treas. of Delaware county. Error to the circuit court of Delaware county. J. S. Jones & Son for plaintiff. George Coyner for defendant.

5367. Claribel Ives v. Margaret C. McNicoll. Error to the circuit court of Hamilton county. Kittredge & Wilby, for plaintiff.

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## COMMENDATIONS.

The following selections give the pith of some of the many commendatory letters we have received from time to time. Want of space prevents our giving all the letters, and we submit portions of a few of them, as specimens of the whole.

A well known lawyer in Northern Ohio writes:

"The OHIO LEGAL NEWS, I believe, is the best legal paper ever published in Ohio."

Another says:

"I have been a subscriber to all the other Ohio law papers published within the last thirty years, and am frank to say that yours is ahead of any one of them."

A leading member of the Cincinnati bar says:

"You have made hustling times with your competitor and although have made him improve his paper considerably, it is yet far behind yours."

An attorney of prominence at Columbus says:

"I learn that your journal is regarded by the profession as the leading one, and as I desire to keep up with the procession, so I send you my subscription."

A distinguished attorney in Central Ohio writes:

"Allow me to congratulate you on the excellency of the OHIO LEGAL NEWS. I consider it the best local law journal in existence today."

A well known ex-judge, upon return to practice, wrote:

"I have become in the habit of relying on your LEGAL NEWS to keep myself posted in the matter of current decisions, and items of news while upon the bench, and I should be unable while in practice, to go ahead with proper assurance if I did not subscribe for the NEWS."

A retiring circuit court judge wrote us:

"You have not only set the pace for competitors, but made it so rapid that they do not appear to be in the race. I am unable to see how a lawyer can be without your paper."

Another member of the bench says:

"Containing, as it does, so many of the current decisions of interest, not published elsewhere, it seems impossible that a lawyer who aims at success can permit himself to go without it."

Another judge writes:

"I like your plan of publishing the decisions. It will be a good thing to furnish the profession with the bound volumes as rapidly as completed. I like, also, the good fat volumes you are publishing."

An able attorney in a prominent inland city writes:

"Your subscribers, so far as I have heard, have nothing but good words for the OHIO LEGAL NEWS. Your efforts seem to have met their unqualified approval."

Another well known attorney from an inland city, having been a subscriber for some time writes:

"I take this opportunity to express my great appreciation of the LEGAL NEWS. I consider it by far the best legal publication in Ohio, and if you continue to improve as you have in the past year, it will have no superior in any state."

A well known law firm in Northern Ohio writes:

"We find the LEGAL NEWS indispensable in our practice. It is a work of superior merit, and the most complete and ably edited law magazine in the state."

Roscoe Conkling, describing a witness on the other side of the case: "Gentlemen, I think I can see that witness now—his mouth stretching across the wide desolation of his face, a fountain of falsehood and a sepulchre of ruin."

A German court in Berlin, Germany, made an odd ruling this week. A man was accused of stealing electricity by tapping an electric light company's wires. The court ruled that only moveable material could be stolen which electricity was not, and therefore the man was acquitted.

In an action by a husband to recover damages for the alienation of his wife's affections, and for criminal conversations, a letter written by the wife to her paramour, after the alleged intercourse but during the period of alienation, is admissible to show her feelings toward him during that time; *Puth v. Zimbleman*, (Iowa), 68 N. W. Rep., 895.

Hon. Theodore K. Funk, a criminal lawyer of Portsmouth, has decided to test the constitutionality of the law defining burglary. He has been defending a person charged with burglary, and had moved to quash the indictment on the ground that the words "or any other building," used in the statute defining the crime renders it vague and not specific, which motion the trial judge promptly overruled.

A sheriff to whom a chattel mortgage is delivered for the purpose of executing the power of sale therein, is authorized to sell only for cash, and the mortgagee is not bound by a sale on credit under an agreement made by his agent and the sheriff and bidder without the knowledge, consent, or subsequent ratification of such mortgagee; *Maddox v. Tague*, (Mont.), 46 Pac. Rep., 535.

The publisher of a libel is liable for all the damages which the injured party sustained thereby, including not only the injury to his character, but also the injury to his feelings, and for the mental sufferings caused by the libel, and for such other damages as were the direct or necessary result of such publication, though he believed the publication to be true; *Lehrer v. Elmore*, (Ky.), 37 S. W. Rep., 292.

Neither the possession or occupancy of land by a daughter of the owner, with her husband and children, nor the making of improvements thereon by them will be held such a part performance of a parol promise by the father to make a gift of the land to the daughter as to render such promise enforceable against a subsequent grantee of the father, without clear and positive proof of the promise, and that the possession was taken with sole reference thereto; *Meigs v. Morris*, (Ark.), 37 S. W. Rep., 302.

One who has been induced to enter into a marriage contract by the misrepresentations of another that the woman was virtuous and respectable, when in fact she was pregnant at the time by the party inducing the marriage, may maintain an action against him for the damage thereby sustained, and in such case exemplary damages may be awarded, such action being maintainable upon the ground of the loss of consortium, as well as that of pecuniary loss. *Kyek v. Goldman*, N. Y. court of appeals.

Attorney-general Monnett, in an opinion rendered Wednesday regarding the question submitted to him by school commissioner Corson, relating to the compulsory education law, holds that every minor between fourteen and sixteen years of age, whether he can read and write the English language or not, is obliged to attend school, unless he is engaged in some regular employment, and that upon proper notice being served, penalties can be inflicted under the statutes upon parents, guardians, etc., for neglecting to send such children to school.

The suit in mandamus to test the constitutionality of the Torrens land transfer act, was filed in the supreme court last Monday, by Attorney General Monnett, against Auditor of State Guilbert and Secretary of State Taylor, and other members of the board appointed by the act to prepare blanks to be distributed among the county officers.

The question is raised by the state auditor refusing to prepare the forms required by law. The suit is brought by agreement between the attorney general and auditor of state, as it was deemed best to have the validity of the law tested before it goes into operation, and thereby save any unnecessary delay and expense, that would naturally result should the law be tested after going into operation.

In an action for the conversion of certain notes collusively transferred to defendant by plaintiff's agent, it appeared that under the contract of agency all notes were to be taken in plaintiff's name, and that the agent, contrary to his agreement, had taken the notes in his own name; it was held, that the plaintiff, by bringing the action, sufficiently ratified the act of the agent in taking the notes in his own name to entitle him to recover for their conversion; *Warder, Bushnell & Glessner Co. v. Cuthbert*, (Iowa), 68 N. W. Rep., 917.

With an evident fancy for jokes that are reversible, a judge in a recent case says: "Jokes are sometimes taken seriously by the young and inexperienced in the deceptive ways of the business world, and if such is the case, and thereby the person deceived is led to give valuable services in the full belief and expectation that the joker is in earnest, the law will also take the joker at his word, and give him good reason to smile. The law discountenances deceit, even practiced under the form of a jest, if the weak, immature, or confiding are thereby imposed on to their injury."

The death of Judge Anson Pease, of Massillon, occurred in that city Wednesday morning at 9 o'clock. He had been ill for more than a month, and at the time of his death, he had reached the remarkable age of 77 years. Judge Pease was senior member of the law firm of Pease, Baldwin and Young, and he was one of the most able members of the Stark county bar. As a citizen he was honored and respected. When news of his death reached Canton, the county seat, court was immediately adjourned.

Judge Pease had served two terms as common pleas judge, and while on the bench, his ability and integrity were never questioned.

The constitutionality of the law known in Cuyahoga county as the "special road law," was bitterly attacked in the circuit court of that county, this week, by Attorney Prentiss, who claimed that the legislation was special, and therefore unconstitutional, it being passed for the benefit of Cuyahoga county, and applied only to this county. Attorneys White and Stewart, representing the other side vigorously insisted that the law was constitutional, declaring that the law applied to any county, providing that county contained a city of the second grade, first class. They showed that

it was possible for another county to have a city of that grade and class, and thereby reasoned that the law was a general law and not a part of the obnoxious special legislation.

Judge McNeil, of the Hamilton court of insolvency, recently held that where the wife of an assignor joined in a mortgage, and at the hearing for a distribution claimed her inchoate right of dower, and then assigned this right to another in payment of a debt, that she was entitled to have her inchoate right of dower ascertained, but inasmuch as she joined in the mortgage, which although unrecorded, is good as between the mortgagors and mortgagees, and her assignee having knowledge of the existence of the mortgage, by reason of being a witness to its execution, the dower upon distribution must be subrogated to the mortgage so far as necessary to satisfy his claim.

#### BAR COMMITTEE.

The following committee for the examination of candidates for admission to the bar during the ensuing year was appointed by the supreme court last week:

A. D. Follett, chairman, Marietta.  
Paul Howland, Cleveland.  
Edmund B. Dillon, Columbus.  
Geo. C. Kohler, Akron.  
Lyman Cunningham, Chillicothe.  
J. P. Cadwell, Jefferson.  
L. A. Koons, Athens.  
J. F. Stockdale, Cambridge.  
Hiram Van Camp, Toledo.

The committee is entirely new, with the single exception of Mr. Follett.

#### AN EXPLANATION.

[Communication to OHIO LEGAL NEWS.]

I frankly confess the anachronism referred to by Mr. Maiden in your issue of Dec. 12th and beg leave to say that I only used the illustration more to emphasize the fact that at that time and for centuries prior thereto the death penalty was regarded cruel and atrocious by all persons, except the rulers of the kingdoms and governments. And feeling that in this country under our constitution, the people are recognized as the true rulers and they are the ones who determine what the government may do. Therefore when they determined that cruel and unusual punishments should not be inflicted, without further definition it seems that it is not unreasonable to define the term in the

light of what the people in other countries regarded cruel punishments. It is certainly a fact that any punishment purposely administered to cause death must be considered cruel. It also seems reasonable to apply the same rule to a state or government that is applied to persons and allow the right to take life only in cases of self defense. As the rule of self preservation is the first law of nature; yet that rule is limited as to persons and only allows a person the right of taking the life of his assailant while in eminent danger of life or limb, but does not extend to taking life after the assailant has been taken into custody and no imminent danger exists. If this doctrine be applied to the state, the right to take life for self protection would cease as soon as the state had the victim fully under its control so as to prevent further injury. So it was the cruel and barbarous doctrine which I desired to have considered and not the historical event and the criticising is kindly acknowledged.

Very truly yours,

D. F. REINOEHL.

#### DEATH OF JUDGE MALLON.

Former Judge Patrick Mallon, of Cincinnati, died Tuesday morning of last week at 9:30, at his home on Mt. Auburn. It had been noticed by the bar that he had been slowly failing ever since the death of his wife three years ago, but he had been about until very recently, and the news of his death came as a surprise and a shock. The immediate cause of his death was heart failure.

Judge Mallon was born in the county of Tyrone, in the north of Ireland, March 17, 1823. He would therefore have been seventy-four years of age on his next birthday. His parents removed to this country when he was four years of age. His early education was obtained in the vicinity of Saratoga Springs, New York, where his parents had taken up their residence. He began the study of the law in Troy, New York, completing it in the office of the late Alphonso Taft, in this city, in 1848, when he was admitted to practice. His first law partnership was with Judge Taft and Thomas M. Key, which was continued until 1857, when Judge Mallon took his seat on the common pleas bench. He was defeated for a second term and retired from the bench in 1862, when a law partnership was formed with Christopher Von Seggern, which was continued for six years. In 1870 a partnership was formed with John Coffey, and in 1888 Hon. Guy Mallon,

the Judge's son, was admitted to the firm, which became Mallon, Coffey & Mallon, and has been continued to the present time. Mrs. Mallon was a daughter of Thomas D. Beadle, of Revolutionary stock. Their children are four in number—Howard T., a business man in Spokane Falls, Washington; Guy W., who has just been alluded to; Mrs. E. B. Sargent, and Neil, a student at Yale. Judge Mallon was a careful and able lawyer, and a man of the highest integrity and of a loveable disposition. He leaves no enemies, but many who admired and honored him.—*Court Index*.

#### CITING AMERICAN REPORTS IN ENGLAND.

The increasing and popular practice of citing American reports in English courts, is the subject of much adverse criticism. The *London Solicitor's Journal* says:

"The American reports have this month attained the dignity of a place in a head note to *Kennedy v. Trafford*, 1896, 1 Ch. 763, says: '*Van Horne v. Foudy*, 5 Johns. Ch. (N. Y.) 388, not followed.' A decision of Chancellor Kent is cited as authority to the English court of appeal, and is not followed. Why not? Because in spite of the great attainments, judgment and skill in the application of principles of Chancellor Kent, the English court of appeal did not know how far the law of the state of New York and the law of England were alike in these matters. And surely it is not their business to know.

'It is quite bad enough to cite foreign decisions *Arguendo* and by way of analogy, unless the foreign law is proved as a fact; the citation is even then fairly useless. But the citation of such foreign decisions as authorities in an English court should be repressed with severity as both dangerous and misleading. On this point we can not do better than recall the strong remark of Lord Halsbury and Cotton and Fry, L. JJ., in *re Missouri Steamship Co.* (42 Ch. Div. 321, 330). On counsel proceeding to read the judgment of the supreme court of the United States in the Montana case, Lord Halsbury, C., said: 'We should treat with great respect the opinion of eminent American lawyers on points which arise before us, but the practice, which seems to be increasing, of quoting American decisions as authorities, in the same way as if they were decisions in our own courts, is wrong. Among other things, it involves an inquiry, which often is not an easy one, whether the law of America on the subject on which the point arises is the

same as our own.' Fry L. J., said: 'I also have been struck by the waste of time occasioned by the growing practice of citing American authorities.'

"And Cotton, L. J., added: 'I have often protested against the citation of American authorities. If the practice gets thoroughly established we shall soon have counsel contending that a well-considered decision of an English judge was wrong because some out-of-the-way American case was not cited to him or that another case has been overruled by an American court. We have such an abundance of case law on every subject in our own reports, that principle has very seldom an opportunity of coming to the front. When, however, that case does arise, for the law's sake, do not let us allow English principle to be stifled by foreign competition.'"

#### IMPROVEMENT LAW.

Some doubt has arisen as to the validity of the improvement law, passed by our last legislature and which provided for the improvement of the state house. The chief objection as to its validity seems to be, that the law did not receive the necessary two-thirds vote as required by section 29, article 2, of the constitution. In our opinion this section of the constitution requiring a two-thirds vote of the members of both houses of the legislature, in certain cases, does not apply to the state house improvement law. The section above mentioned applies merely to cases where there is a claim existing against the state at the time an act is passed providing for the payment of such claims.

In the case of *Ohio ex rel. v. Oglevee et al.*, 37 O. S., 1, which was brought to test the constitutionality of an act appropriating money for an improvement at the Ohio University, the bill having received less than a two-thirds vote, the writ of mandamus was allowed and the law sustained in the following decision, the syllabus of which is as follows:

"1. The act of March 21, 1881, appropriating money to repair the buildings of the Ohio university, is not within the operation of section 29, article 2, of the constitution, requiring the allowance, by two-thirds of the members elected to each branch of the general assembly, of claims, the subject matter of which was not provided for by a pre-existing law.

"2. The fact that there was no existing fund in the treasury to which the sum so appropri-

ated could be added, does not prevent the operation of the statute.

"3. Funds in the state treasury, arising from taxes levied and collected for 'the expenses of the state,' may be subjected to the payment of such appropriation."

The court further says, that, "To sustain the objection to the act, that it is in conflict with the constitution, it must appear that the appropriation is to a claim, the subject matter of which had been provided for by pre-existing law."

This case, we think removes all doubt as to the invalidity of the improvement law passed by the legislature last winter.

#### COMPULSORY EDUCATION LAW.

[AN OPINION.]

Columbus, O., December 16, 1896.

*Hon. O. T. Corson, Commissioner of Common Schools, Columbus, O.:*

DEAR SIR: This department has the honor to be in receipt of a communication from your office, requesting an opinion in writing regarding the power of a board of education under the compulsory education law, to compel the attendance of a minor over fourteen and under sixteen years of age, who can read and write the English language, and is not employed at some regular employment.

This question involves the construction and harmonizing of the present act, entitled "An act to compel the elementary education of children."

Section 1 of said act provides that all children between the ages of eight and sixteen, not engaged at some regular employment, shall attend school for the full term of the schools of the district in which they reside, during the school year, unless excused for the reason above named. Section 3 also provides that all minors over fourteen and under sixteen years of age, who cannot read and write the English language, shall attend school at least one-half of each day, etc., unless provision is made for such minors to have private instruction as in said act provided, while so employed.

Section 4 further states that every child between the ages of fourteen and sixteen years, unable to read and write the English language, or not engaged in some regular employment, being guilty of the defaults set forth in said section, may be punished according to that act.

Again, section 7 treats of the two classes of minors, namely, those between the ages of 8 and 14, and the class inquired about, those between 14 and 16 years of age, and provides that when any child between the ages of 14 and 16 years cannot read and write the English language, or if such child is not engaged in some regular employment or being discharged is not attending school without lawful excuse, the truant officer shall notify the parent, guardian or other person in charge of such child of that fact.

Taking these sections all together and trying to read them harmoniously, and using the plainer clauses to explain the ambiguous ones, I am of the opinion that section 1 elucidates the ambiguity of section 7, and the true reading should be, that every minor between 14 and 16 years of age, whether he can read and write the English language or not, is obliged to attend school unless he is engaged in some regular employment. And that because he can read and write and is above 14 and under 16 years of age, will not justify him in remaining without regular employment for that reason alone. And upon the proper notice being served upon the parent, guardian, etc., like liabilities would arise, and punishment should be inflicted upon such person for neglect.

Any other construction would not give full meaning to all parts of the act, and this one is in the interests of good government and order.

Respectfully submitted,

F. S. MONNETT,  
*Attorney General.*

#### A NEW CRIMES ACT.

Attorney General Harmon, in his annual report to congress, calls the attention of that body to the defects existing in criminal procedure in the federal courts, and in further suggesting the necessity of enacting a new crimes act, says:

"I think that a new crimes act should be passed as speedily as possible, which should contain provisions simple, easily understood, and general in their scope; that a uniform system of punishment should thus be provided, and that as the cases arising in the future present laws relating to these crimes should be repealed. This work could be easily and quickly performed by a commission.

"The increasing repugnance on the part of juries to inflict the death penalty, in connection with the fact that the law makes no de-

grees in murder, constantly leads to the acquittal of persons charged with capital crimes in cases where the facts proven not only warrant conviction for murder, but oblige the court to charge that they do not permit a conviction for mere manslaughter. This danger to society can be at least mitigated by the establishment by statute of different degrees of murder with corresponding appropriate grades of punishment. Juries will not then be confronted with the alternative of a verdict which carries the death penalty or a verdict of acquittal in cases where they think the accused guilty of murder, but not deserving of the extreme punishment.

"The second defect is in the unfortunate results of the present law governing writs of error to the supreme court in criminal cases. Defendants in criminal cases are generally poor. It is hard for them to obtain counsel to defend them at home, but it is generally beyond their power to obtain counsel to argue their cases before the supreme court. While the criminal jurisdiction of that court is now so extensive as to take up a considerable part of the time spent by the justices in the study of records and briefs yet, the arguments of the cases are largely for the reason above stated, comparatively few. They are mainly confined to cases against the wealthier classes of defendants, such as smugglers and bank officers.

"The questions in these criminal cases are for the most part comparatively trivial and not of general importance. I think that a transfer of the criminal appeals to the circuit court of appeals, with the present system of permitting important questions to be presented to the supreme court by certification is highly desirable.

"The cases of the United States against Rider and the United States against Hewecker disclose another grave defect in our criminal procedure. The decisions are that the statute permitting the supreme court to review questions of criminal law upon certificate of division between the circuit and district judges has been implicitly repealed. The court had previously ruled that there can be no writ of error on behalf of the United States, in a criminal case. The consequence is, that when a doubtful point arises in a criminal case, there is no way in which it can be taken to the supreme court except by resolving the doubt in the first instance against the prisoner, permitting a conviction, and casting upon him the burden and expense of prosecuting a writ of error. Formerly, when a question arose on demurrer or motion in arrest of judgment, the

judges could certify a difference in opinion. This certificate was submitted to the supreme court, which could thus in a cheap and expeditious manner, dispose of the question. I think that the present statute of the law is unfair, both to the government and to defendants in criminal cases.

"I recommend either that the right to certify division of opinion in such cases be restored, or that a writ of error be allowed to the United States upon questions as arising on demurrer or motion in arrest of judgment."

#### **FORMAL OPENING OF THE FRANKLIN T. BACKUS LAW SCHOOL OF WESTERN RESERVE UNIVERSITY.**

On Wednesday evening of this week there occurred in Cleveland an event of no small interest to the legal profession of the state of Ohio as well as of adjoining states. The opening of the beautiful new building of the Franklin T. Backus Law school of the Western Reserve university, we believe, is the beginning of an era in the history of legal education in the state of Ohio, which promises great good not only to the profession but to the public at large.

In the fall of 1892 the Law school of Western Reserve university was organized with a single class numbering 24 students. It was the aim of the trustees of the Western Reserve university in establishing this school to found an institution which should in every way be a worthy member of an American university giving great promise for the future. The first aim of the trustees was to establish an institution which should aim to train good lawyers rather than many lawyers. With this in view they determined to establish a three years' course giving the degree of LL. B. only for three years' work. It is believed that this was the first school west of New York which established a three-year course and required three full school years of nine months each for the granting of the degree of LL. B. The plan then and now in vogue at Harvard and Columbia was for the greater part adopted. And for the purpose of doing the work thoroughly it was decided to offer only the work of the first year course in the opening of the school, adding the second and third year course in the next two years. A great deal of time and careful consideration was given first of all to the selection of teachers and the trustees finally decided to select for the work of the first year, Hon.

Charles E. Pennewell, formerly judge of the common pleas court of Huron county; Hon. Augustus J. Ricks, judge of the district court for the northern district of Ohio; Harry A. Garfield, who had received his training in law first at Columbia law school and then at the English Universities and Evan H. Hopkins, who had graduated from Harvard law school. The work of the first year was characterized by its thoroughness and by the enthusiasm of the students, all of whom became firm and lasting friends of the school and manifested unbound faith in the future of the institution. In the second year of the school the work for a second-year class was provided and the following men were selected for this additional work: Hon. Henry C. White, who for nine years has been judge of the probate court of Cuyahoga county and who received the degree of LL. B. from the university of Michigan; Hon. Theodore E. Burton, formerly one of the instructors at Oberlin College, then and now a member of Congress; Hon. Peter Henry Kaiser, at present the county solicitor of Cuyahoga county, and Homer H. Johnson, Esq., who had received the degree of A. M. and LL. B. from Harvard. The attendance of school this year numbered thirty-four. In the third year of the school a third-year course was adopted and the following men were selected for additional teaching: Hon. A. T. Brewer, one of the joint authors of the work on Ohio Corporations; Hon. Alexander Hadden, who had for six years been the county prosecutor of Cuyahoga county; A. A. Stearns, Esq., who had received his legal education at Harvard; Roger M. Lee and Frederick A. Henry both of whom had received the degree of LL. B. at the university of Michigan. The attendance of school during this year was thirty-seven and in the following June the first commencement exercises of the school were held. Since then there has been added to the faculty, Hon. James H. Lawrence, formerly attorney general of Ohio and director of law of the city of Cleveland; E. L. Thurston, Esq., for many years a patent attorney of Cleveland; Paul Howland, Esq., who graduated from Harvard Law School in 1891; and A. G. Carpenter, who graduated from the law department of the university of Michigan and for many years a successful practitioner at the Cuyahoga county bar. The attendance this year has leaped to the number of sixty-eight, being an increase of about sixty-five per cent. over the attendance of the preceding years.

During the past two years there has been published by the law school a law journal known

as. The Western Reserve Law Journal, which has already acquired an enviable reputation and which is fast becoming recognized as one of the leading law journals of the country.

The building into which the school has just moved is a beautiful building constructed of Ohio buff sandstone and has a copper roof.

The entrance is through a portico in the main hall nineteen feet wide. The stairs, down, lead to toilet and recreation rooms. On each side of the main hall, first story, are recitation rooms 25 feet by 40 feet, 13 feet high and on the second story a recitation room 25 feet by 40 feet, 15 feet high; also two professor's rooms nine feet by 12 feet. Each room is abundantly lighted with spacious windows and finished in Flemish oak. A broad flight of stone steps flanked with buttresses form the approach to the portico. The floor of the portico is Italian white marble, the walls being Pompeian brick, the ceiling paneled in quartered oak. On the frieze of the portico are the letters *Lex* and over this portico is the seal of the University cut in relief.

A broad frieze extends around under the main cornice on which is cut in Roman letters this inscription; "According to the sentence of the law which they shall teach thee, and according to the judgment which they shall tell thee, thou shalt do."

"The absolute justice of the State, enlightened by the perfect reason of the State, that is law." "The law is the last result of human wisdom acting upon human experience for the benefit of the public."

The effect in the architecture is Italian Renaissance. The building is heated with steam and lighted with gas, the fixtures corresponding in design to the building and are very handsome. The architect is Mr. C. F. Schweinfurth.

In the basement there is to be found a large number of lockers giving each student a place where he can keep his coat, books, etc. under lock and key. The recreation rooms furnish an admirable place for men to meet and discuss topics of interest to each other and more than one bitterly contested legal battle has already been waged here. Each one of the recitation rooms is large enough to accommodate without any crowding whatever 70 students and in each room there is furnished for each student a small flat topped table on which to lay his books and take notes. The chairs in the room being made specially for this school. The floors are all highly polished through the entire building from the basement

up. The library is already well supplied with law books and additions are being constantly made to it. The building is so constructed that it is possible in the future to put a wing on the rear which will almost double the capacity of the present building. As at present constructed the building can accommodate one hundred and fifty to two hundred students; with the new wing added the building will be capable of accommodating at least four hundred students. Many of the friends of the school do not hesitate to express the opinion that it is only a matter of a very few years when the new wing will become a necessity and when the school will enroll at least four hundred members.

#### MODERN ABSTRACTS OF TITLE AS REQUIRED IN OHIO.

*General observations:* "It is a matter of surprise," says Mr. Preston, concerning conveyancing in England, "that more titles do not prove defective, and it is a greater surprise to the American lawyer who thinks of the knowledge of the law of fines, and recoveries, feoffments, covenants to stand seized, contingent remainders, executory devises, and springing, contingent, shifting or resulting uses, that the English lawyer must have had, in order to have been competent to pass upon a title, and the complex and useless machinery of English conveyancing that must have been understood to draft a conveyance, much of which is unknown in this country. It is thought by many that conveyancing, and a knowledge of titles is too simple in America, and that much less attention is paid to them than the subject deserves.

The examination of a title here, in many places, has been supposed to be a matter of so little difficulty, that most any lawyer could do it, and pass upon its validity, or to be a matter of so little importance as to rarely be thought of at all. To commence with the original source of title and examine the parts of every deed with minuteness of detail, and to make inquiry into extraneous facts, has been a degree of diligence seldom exhibited by a purchaser, and generally regarded as a process hardly worth paying for. While this course has been the practice in the past, in late years land has become more valuable, and costly lessons of negligence in this particular have forced upon the people the necessity of exercising more care in taking title to real estate.

The subject of abstracting has become one of importance within the past few years, and it will grow in importance as fast as land purchasers become educated to the necessity of taking no title that is not vouched for by a carefully prepared abstract, and which has not been passed upon and approved by some competent examiner or counsel.

It may be that with the adoption of the Torrens system of land titles the business of the abstracter will be undone and the necessity for abstracts be removed, but if so it will be far in the future, and in getting the land registered and the defects of title removed, the abstracter will be a very important personage, and his services in great demand.

As this subject possesses so much importance, and as abstracting is so poorly understood, even among attorneys, we have been prompted to prepare this article. And we may here observe, that not only has the English niceties and difficulties in conveyancing been removed in this country, but along with the reform has come a methodical and systematic form of abstracting, in which the results of the examination are presented with simplicity and clearness, and the progress in preparing abstracts is fully as marked as is the improvement in the transfer of land titles. Abstracts prepared upon printed forms, with plats to show the land described, and in which questions bring out in their answers every defect in the chain of title have taken the place of the old prolix form of written out abstracts, which were scarcely ever so prepared that the examiner could comprehend one without exacting study, and never was clear that it gave the purchaser a proper title.

*Who should furnish.* It is the duty of the vendor to furnish the vendee with an abstract of the title to the land purchased. The purchaser may require this, and if not complied with, he would be under no obligation to take the property. In England it has been the rule that if an abstract was withheld, it could be compelled in a court of equity, under a decree for specific performance.

*Scope of an abstract.* The abstract should contain a correct and faithful statement of all the circumstances disclosed by the deeds, or other evidences of title, and when it depends upon extraneous facts, such as marriage, possession, descent, identity of persons, and the like, a carefully prepared and verified statement of all extraneous facts necessary to a

full and clear explanation of the condition of the title should be given.

It is true that the records are the repository of the title to a piece of land, and the examination must show all the information found in them. The examiner must correct, condense, and arrange from the records the information they contain, giving the facts without any expression of opinion as to the rights of any of the parties that hold or have held the title, and he must also, when necessary, go farther and disclose, through auxiliary statements, whatever facts he can ascertain which will explain any defect or supply a missing link in the chain of title. The purchaser has a right to require that the abstract should state all the evidences of title, or want of title, which it is within the power of the vendor to give.

*Form of abstract.* As we have suggested, the modern abstract is made upon a blank form, and consists merely of answers to pertinent stated questions about the conveyances. The questions are so arranged and put that, if faithfully answered, all defects in the title will be disclosed.

The advantages of these forms are the ease with which the abstract can be examined, and the assurance that the examiner can have that the work has been properly done. They have become so popular that examiners for large loan companies will not accept abstracts otherwise prepared.

We give below the information that is sought by these blanks, and the questions they contain, and at the same time present the leading points to be observed in preparing a proper abstract when the blanks are used.

*Names of parties.* This part of the caption of the abstract, is arranged for in the upper left hand corner of the sheet. The names of the parties should be written therein legible style. The character in which the parties severally execute the instrument, whether in the capacity of heir-at-law, devisee, executor, attorney, etc., should always be stated with the same certainty of identity, as it appears in the originals.

All errors and omissions, or imperfect designations should be noted in such a manner as to bring them to the attention of whoever may peruse the abstract. In case the space in the caption is not sufficient to state the point clearly, it may be given under the question as to defects, further down on the blank.

The domestic relations of either of the grantors or grantees, if stated, should be given with the same particularity as in the original. Descriptions of persons, and particulars as to residence, marriage, etc., should be given where they may become material.

Special descriptions found in the instrument, especially when explanatory of the capacity in which the parties act, should be given verbatim, and always when they indicate or represent an official character.

*Kind of instrument.* The name of the particular kind of conveyance has but little efficacy or value, in the abstract, except as an introduction to the synopsis, and is placed conspicuously, at the head, as it apprises the reader at the outset, as to the character of the instrument to be examined. The words "Warranty," "Quit claim," "Mortgage" or other pertinent name, will generally be sufficient.

Instruments of which the legal import cannot well be determined by the abstractor, such as equitable interests, remainders, reversions, estates for life, easements, and the like, may be given by the general name "deed," with a full description in answer to "what estate is conveyed," and its effect left to counsel.

*Date of instrument.* Although the date of the instrument, as deeds are now drawn, is usually found in the attestation clause, near the end, this item is placed next to the kind of instrument, as it forms a part of its identity, and ordinarily determines when it takes effect, as delivery is usually made at the time specified.

*Date of record.* As the date of execution and of record are usually considered together, to facilitate the labors of the examiner they are placed together in the abstract. The date of record is important in passing on questions of priority. This entry should show the kind of document in which the record has been made, as in records of deeds or of mortgages, and the number of the volume and page.

*Consideration.* The consideration is usually of minor importance, but as it may become a factor of interest, it should always be given.

The consideration can usually be expressed in figures, but when other considerations are expressed, as "love and affection," or "marriage," and the like, the recitals should be quoted, so as to show fully whether sufficient to support a conveyance.

If no consideration is expressed, the words "no consideration" or equivalent ones should be used.

When the consideration money is made payable in a particular manner, or out of a partic-

ular fund, or to particular persons, or for particular purposes, the words of the clause and not their effect should be given, so that the counsel may determine whether the power or trust has been complied with, and that the money has been paid by or to the proper parties.

*Does wife join in granting clause?* The names of the grantors often appear several times in a conveyance of land—first, in the premises, accompanied by a description of the person and other particulars as to residence, capacity, etc.—next, in the covenant clause, either by name, or an appropriate pronoun, and finally in the execution. It is expected that the abstractor will compare the names, wherever found, and note existing variances under the head of defects, but on account of the specific acts which are required by law of the wife to divest her of her dower estate, and of the close scrutiny required of conveyances by married women, or in which they join, a special question is commonly asked, so that the examiner may be assured of the full facts.

As the greater part of the formalities concerning the conveyance by a married woman of her interest in realty have been dispensed with in most states, by modern legislation, in many places abstracts of present conveyances could be made without this question, but as the removal of common law disabilities has been made by a series of acts extending over a period of years, and often not yet judicially determined, it is yet safe to proceed only as if former laws were still in force.

When a married woman joins with her husband in a conveyance of lands, which purports to convey the entire estate therein, she is estopped from afterwards setting up any title thereto, whether existing at the time of making such conveyance, or having been subsequently acquired by her. Hence, a reply to this question, if the conveyance is of the wife's property, will indicate whether she has become a party to the grant and thus lost her estate; or if of the husband's property, whether she has lost her inchoate right, as joining in the granting clause would have the same effect in either case.

If she did not join in the granting clause, the answer should be "No," and an explanation given under defects.

If the conveyance was of the wife's lands and the husband did not join, the defect should be carefully noted.

*Is dower relinquished?* This question refers to the specific release of dower, and is used to reach with certainty a class of cases tha

might not be covered by the preceding question.

Courts hold that if the wife properly joins her husband in a deed as a grantee, it will be an effectual extinguishment of her dower, without mention of the estate conveyed by her in a dower clause. But as the joinder of husband and wife as grantors is often either not made at all, or imperfectly done, and the existence of a dower clause makes the extinguishment more certain, this question is asked, and should be answered, although the answer to the former question may also show that dower is barred.

If the instrument contains no dower clause, the answer should be "No," and if no joinder was made in the granting clause, the defect should be pointed out.

**Granting clause.** A deed of bargain and sale, if complete in other respects, is a valid conveyance, although technical words of grant are omitted, yet the words of grant, usually "give, grant, bargain and sell," should usually be recited fully, so that it may be known with assurance that the intention was to vest a complete title in the grantee. In a quit claim, the words are usually "remise, convey and quit claim" but other words indicating conveyance will do as well.

[To be continued.]

## SUPREME COURT OF OHIO.

### Official Record of Proceedings.

#### General Docket.

Tuesday, December 15, 1896.

3549. Fillmore Musser, Auditor v. Mary O. Adair. Error to the circuit court of Scioto county.

MINSHALL, J.

The proceeding of county auditors, under sections 2787 and 27821 Revised Statutes, authorizing such auditors, in certain cases, to make additions to the valuation of the property of individuals, returned for taxation, cannot be reviewed on error under section 6708, Revised Statutes. The remedy of the individual for errors or mistakes in such cases, prejudicial to him, is by injunction under section 5848, Revised Statutes.

Judgments of the circuit court and of the common pleas, reversed, and petition in common pleas dismissed.

3828. Ovid P. Phillips et al. v. John W. Heron et al., Trustees et al. Error to the superior court of Cincinnati,

SHAUCK, J.

1. The act to restrict the entailment of real estate (Revised Statutes, section 4200,) supercedes the rule of the common law upon the subject.

2. It inhibits only devises to persons who are in fact more remote than the immediate issue of persons in being at the death of the testator.

3. Within the meaning of the act, a child *in utero* at the testator's death is in being.

Judgment affirmed.

5002. Charles I. Weaver v. The Columbus, Shawnee & Hocking Ry. Co. Error to the circuit court of Franklin county.

BRADBURY, J.

1. Where on the trial of an action in a court of common pleas, the court, upon the motion of the defendant, arrests the evidence of plaintiff from the jury, discharges the jury and renders judgment for the defendant, the plaintiff may make such action of the court the subject of a motion for a new trial.

2. If, in such case, the motion for a new trial should be overruled, the period of time within which a bill of exceptions may be taken should be computed from the day that the motion for a new trial was overruled.

Judgment reversed.

4550. The P., C., C. & St. L. Ry. Co. v. Charles C. Cox. Error to the circuit court of Warren county.

SPEAR, J.

An employee of a railroad company, voluntarily and with full knowledge of the character and effect of the contract he was assuming, applied for admission to an association composed of the company and a portion of its employees, called the "Voluntary Relief Department," and being admitted, contracted that the company might deduct from his wages the sum of seventy-five cents per month for the purpose of forming, with other like contributions by other employee members, and contributions, which by the contract the company was obligated to make a relief fund for the benefit of the employees in case of sickness, accident or death; and contracted, further that in case of accident, the acceptance by him thereafter of relief from the relief fund so accumulated, should have the effect to release the company from liability for damages.

Held: 1. Such contract is not interdicted by the act of April 2, 1890, 87 O. L., 149, "for the protection and relief of railroad employees," etc. 2. The contract is not contrary to public policy. 3. The contract does not lack mutuality. 4. It is based upon a valid consideration.

Judgment of the circuit court reversed, and that of the common pleas affirmed.

4880. Amos Wolf, Adm'r, v. The Lake Erie & Western Railroad Company. Error to the circuit court of Mercer county.

BURKET, J.

1. In actions in the name of an administrator under sections 6134 and 6135, Revised Statutes, the administrator is a mere nominal party, having no interest in the case for himself or the estate he represents, and such actions are for the exclusive benefit of the beneficiaries in said sections named.

2. In arriving at the total amount of damages in such cases, the jury should consider the pecuniary injury to each separate beneficiary, not found guilty of contributory negligence, but the verdict should be for a gross sum, not exceeding ten thousand dollars.

3. In such actions the defense of contributory negligence, contributed to the death of the deceased, but the contributory negligence of some of the beneficiaries, will not defeat the action as to others, who were not guilty of such negligence.

Judgment affirmed.

3854. *Eliza L. Joyce v. Frederick L. Dauntz et al.* Error to the circuit court of Pickaway county.

WILLIAMS, C. J.

1. As a general rule, any person having an interest in property subject to an incumbrance which may defeat or impair his title, has the right to disengage the property by payment of the incumbrance, and when he does so, if the debt is not one for which he is personally liable, he is entitled to be subrogated to the rights of the incumbrancer against the property; and, subrogation arises by operation of law, whenever a mortgage debt is extinguished by one entitled to redeem, other than the mortgagor or person ultimately liable for the mortgage debt.

2. Where land encumbered by mortgage has been sold by the mortgagor for its full value, and the purchase money applied in satisfaction of the mortgage debt, equity will keep the mortgage security alive for the benefit of the purchaser, and enforce it for his protection as against incumbrances subsequent thereto; and where the purchase money so applied is but a partial payment on the mortgage debt, the purchaser will be entitled to enforce the lien to the extent necessary for his reimbursement, when that will not interfere with the mortgagee's security for the unpaid balance.

3. The right of the purchaser to subrogation in such case is not affected by notice of the incumbrances when he bought and paid for the land; nor is it necessary to his right that he show an intention was then present to keep the mortgage on foot for his protection, for that being to his advantage, the intention will be presumed.

Judgment affirmed.

3822. *Effie A. Scott v. Katherine Wissler et al.* Error to the circuit court of Ross county. Judgment affirmed. Minshall, J., did not sit in the case.

3823. *James M. Glenn et al. v. Fred Raine, Auditor.* Error to the general term of the superior court of Cincinnati. Judgment affirmed.

3824. *Lewis Fischer v. Julius Freiberg et al.* Error to the circuit court of Hamilton county. Judgment affirmed on the authority of *Wetzell v. Richcreek*, 53 Ohio St., 62, it appearing that one ground of the reversal of the common pleas by the circuit court may have been that the verdict was against the

weight of the evidence. Other questions not passed upon.

3840. In the matter of the proceedings for contempt of court against *Thomas F. Walsh et al. v. William A. Taylor et al.* Error to the circuit court of Summit county. Judgment affirmed.

3855. *The Syndicate Oil and Fuel Company v. Rebecca Blakesle et al.* Error to the circuit court of Hancock county. Judgment affirmed.

3867. *Chauncy H. Andrews et al. v. J. Craig Smith et al.* Error to the circuit court of Mahoning county. Judgment affirmed.

3871. *Edward Squire v. Lafayette Conkle, Treasurer.* Error to the circuit court of Defiance county. Judgment affirmed.

5002. *Charles J. Weaver v. The Columbus, Shawnee and Hocking Railway Company.* Error to the circuit court of Franklin county. Judgment reversed and cause remanded to the circuit court with instructions to pass upon the questions presented by the bill of exceptions. To be reported.

#### Motion Docket.

2793. *Viola A. Casler et al. v. E. H. Bowen.* Motion by plaintiff to reinstate cause No. 4535 on the general docket. Motion allowed.

2794. *John Tucker v. The Board of Education of St. Albans township, Licking county, Ohio.* Motion by plaintiff for extension of time to print record in cause No. 5231 on the general docket. Motion allowed and time extended to February 1, 1897.

2795. *Luther J. Stewart v. The Village of Barnesville, Ohio.* Motion for leave to file a petition in error to the circuit court of Belmont county. Motion allowed.

2796. *J. T. Hinton v. The Village of Barnesville, O.* Motion for leave to file a petition in error to the circuit court of Belmont county. Motion allowed.

2797. *John Ayar v. The Village of Barnesville, O.* Motion for leave to file a petition in error to the circuit court of Belmont county. Motion allowed.

2798. *The State of Ohio v. Joseph C. Hutchinson.* Motion by plaintiff to advance cause No. 5302 on the general docket. Motion allowed and request for oral arguments noted.

2799. *The State of Ohio v. Joseph C. Hutchinson.* Motion by plaintiff to advance cause No. 5303 on the general docket. Motion allowed and request for oral argument noted.

#### New Cases.

New cases filed in the supreme court since December 9, 1896.

5368. *James Andrews et al. v. Robert C. Finley et al.* Error to the circuit court of Montgomery county. *Wychlift & Belville*, and *P. A. Reece*, for plaintiffs. *Kennedy & Manger*, and *Albert Kerr*, for defendants.

5369. *Lyman P. Lewis et al. v. The State of Ohio for, etc.* Delaware county. Error to the

circuit court of Delaware county. McElroy & Carpenter, for plaintiffs. George Coyner, for defendant.

5370. W. R. Ryan et al. v. L. Dean Holden, Trustee. Error to the circuit court of Cuyahoga county. Arnold Green, for plaintiffs. Kline. Carr, Tolles & Goff, for defendant.

5371. Irvin C. Coe v. D. F. Erb, etc. Error to the circuit court of Franklin county. J. S. Friesner and G. T. Castle, for plaintiff. Thomas E. Steele, for defendant.

5372. The Fidelity Fire & Marine Ins Co. v. Francis J. Gastomski. Error to the circuit court of Cuyahoga county. James M. Williams, for plaintiff. Frank A. Beecher, for defendant.

5373. The City of Circleville v. Ella M. Solm. Error to the circuit court of Pickaway county. C. A. Weldon and Clarence Curtain, for plaintiff. Abernathy & Folsom, and Schleyer & Gearhart, for defendant.

5374. The State of Ohio v. James G. Love. Error to the circuit court of Washington county. F. S. Monnett, attorney general and J. C.

Preston, for plaintiff. L. W. Ellenwood, for defendant.

5375. Charles Klever et al. v. H. W. Riddle. Error to the circuit court of Madison county. Lincoln & Lincoln, for plaintiffs. Durlinger & Emery, for defendant.

5376. William Evans et al. v. Michael Riley. Error to the circuit court of Madison county. Wilson & Smith, and Lincoln & Lincoln, for plaintiffs. Booth, Keating & Peters, for defendant.

5377. The State of Ohio on application, etc., of Charles E. Iliff. Error to the circuit court of Hamilton county. Simral & Galvin, for plaintiff. Spiegle, Foraker & Rendigs, for defendant.

5378. Phillip Baker v. Druzilla Rice. Error to the circuit court of Knox county. C. S. Critchfield & Critchfield & Graham, for plaintiff. Critchfield & Devin, for defendant.

5379. John J. Ramage et al. v. The State of Ohio for the use of, etc., by George Coyner, prosecuting attorney. Error to the circuit court of Delaware county. McElroy & Carpenter, for plaintiffs. George Coyner, for defendant.

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## COMMENDATIONS.

The following selections give the pith of some of the many commendatory letters we have received from time to time. Want of space prevents our giving all the letters, and we submit portions of a few of them, as specimens of the whole.

A well known lawyer in Northern Ohio writes:

"The OHIO LEGAL NEWS, I believe, is the best legal paper ever published in Ohio."

Another says:

"I have been a subscriber to all the other Ohio law papers published within the last thirty years, and am frank to say that yours is ahead of any one of them."

A leading member of the Cincinnati bar says:

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A distinguished attorney in Central Ohio writes:

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A well known ex-judge, upon return to practice, wrote:

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A well known law firm in Northern Ohio writes:

"We find the LEGAL NEWS indispensable in our practice. It is a work of superior merit, and the most complete and ably edited law magazine in the state."

Where one party to a contract which had been executed, had received money from it for the use of another he can not plead its illegality in defense to an action to recover such money. *Andrew v. New Orleans Brewing Assn.*, (Miss.), 20 South. Rep., 837.

In adjudicating disputes between warring church parties, the court can look into the rules of a church organization to ascertain the church law; and, if that be not in conflict with the law of the land, all that can be done is to protect the rights of parties under the law they have made for themselves; *Long v. Harvey*, (Penn.), 35 Atl. Rep., 869.

Where a street railway company, in laying its tracks, has failed to conform to the grade of the streets, according to an express condition of the grant of the right to use such streets, the municipality may change such tracks to the proper grade, and recover the cost thereof from the company; *Borough of Shamokin v. Shamokin St. Ry. Co.*, (Penn.), 35 Atl. Rep., 862.

It is no objection to the validity of a city ordinance that it prohibits acts and omissions made penal by the laws of the state, provided the legislature has expressly authorized such municipal legislation; and, while the ordinance keeps within the limits of the state law, it may be valid, notwithstanding it does not cover the whole ground occupied by the statute. *Kansas City v. Grubel*, (Kan.), 48 Pac. Rep., 714.

In the case of *Hern v. Bevington*, heard on motion to dismiss proceedings in error in the Hamilton common pleas, it appeared that a trial was had before a magistrate and judgment rendered July 10, 1896; a motion for a new trial was overruled, and a bill of exceptions filed, allowed and signed July 13, 1896. The petition in error was filed by the plaintiff August 8, 1896. It was held by Judge Buchwalter that the act amending sections 595, 6560 and 6565, Revised Statutes, (90 O. L., 358), does not amend section 6723, Revised Statutes, or limit to ten days the six months' time therein provided for beginning proceedings in error to vacate a final judgment, and that the amendatory act appears to make it the duty of the justice to certify his proceedings to the clerk of the common pleas court within ten days, but that the procedure in this common pleas court by petition in error as theretofore provided to be filed by the complainant, is not amended.

Where plaintiffs deposited money with third persons as stakeholders, for the purpose of being used as margins in the mere purchase and sale by the defendant of differences in the market prices of stocks and grain, without an actual purchase or sales, these were mere wagering contracts, and illegal; and the money could be recovered back while in the hands of the stakeholders, and before having been paid to defendant. *Dawler v. Campbell*, (Penn.), 35 Atl. Rep., 857.

The Elyria Gas and Water company filed a petition in the Lorain common pleas court, Thursday morning of last week, asking for an injunction to prevent the city of Elyria from selling \$250,000 worth of bonds for the purpose of putting in a new water works system. A temporary injunction was allowed by Judge Hinman. The company claims that the election regarding the issuance of these bonds was illegal. The filing of this petition is the result of a bitter fight the company has made, because Elyria intends to get her water from Lake Erie.

A case of vital importance to the counties of Cuyahoga and Hamilton, was filed in the supreme court last week, Thursday, upon the decision of which rests the validity of the fee and salary laws now in force in these two counties. The case comes from Miami county, and grows out of a special act passed by the legislature giving Miami county a fee and salary law, in accordance with the provisions of the bill regulating the counties of Cuyahoga and Hamilton.

The suit is brought by a taxpayer of Miami county, in which he seeks to enjoin the auditor and commissioners from acting under the law, claiming that it is special legislation, and therefore contrary to the constitution. In the common pleas court a perpetual injunction was granted, thus holding the law to be unconstitutional, and which decision was sustained by the circuit court of that county, which is an exceptionally good one, and upon this it was brought to the supreme court, and should the decision of the lower courts be sustained, it is thought that it will not only make invalid the law of Miami county, but that it will also apply to the law in Cuyahoga and Hamilton counties.

**WILL'S CIRCUMSTANTIAL EVIDENCE.** By Arthur P. Will, of the Chicago bar. One volume, 555 pages, full sheet, \$5.00 net. T. & J. W. Johnson & Co., Philadelphia, 1896.

This book is a treatise on the law of circumstantial evidence, and is fully illustrated by numerous cases, and prepared with special reference to the needs of the American lawyer, being just such a work as has long been called for. It is a work of superior merit in every detail, and one that should be in the library of every lawyer, and as such we can, without hesitation, recommend it to every member of the American bar.

The case of *Scheid v. Scheid*, recently decided by Judge Buchwalter, of the Hamilton common pleas, which was heard on application by the purchaser of property at a partition sale for an order for payment out of the proceeds of the taxes for 1897, levied in 1896; *Held*, that, by section 2854, Revised Statutes, it was the duty of the court in judicial sales to order taxes paid out of the proceeds, and that it is the duty of the county auditor, under section 1042, Revised Statutes, to deliver to the county treasurer, a tax duplicate for the year's levy on or before October 1 of each year, this date being fixed by our supreme court, in the case of *Hoglen et al. v. Cohan et al.*, 30 O. S., 436.

In substance the holding of the court is that the rights of a purchaser at a judicial sale, as to payment of taxes out of the proceeds are fixed, by the date of sale, and after confirmation relate back to that date.

On account of the fact that Attorney General Monnett will appear in defense of the Torrens law in the test case which is to be brought before the supreme court, he will be unable to represent the board, of which he is a member, and defend its position in refusing to issue the necessary blanks to the county auditors, whereupon the supreme court, upon application of Secretary of State Taylor, and Auditor of State Guilbert, the other members of the board, has appointed Judge R. A. Harrison and Hon. J. K. Richards to present the arguments against the constitutionality of the law. The counsel for the board have filed a demurrer in the case, making the point that the law is unconstitutional, and that therefore they cannot be compelled to proceed with the work of preparing the plans to carry out the provisions of an unconstitutional measure. The real issue of the case will arise in the hearing of this demurrer early in January, and thereby the constitutionality of this law determined.

Judge Buchwalter sustained a general demurrer to the petition of one Stephen Warren, a colored man, who has sued the Fountain Square Theater Co., of Cincinnati, for \$500 damages, alleged to have been caused because of his exclusion from the parquet of the theater on account of his color, although he had purchased a ticket for that part of the house, which he says was a violation of his constitutional rights. The ticket was for a performance given on October 4, of this year.

The judge held that courts will take judicial notice of the coincidence of the days of the week and the days of the month, and that it will accordingly be read into the petition that October 4 of this year fell on Sunday, and that from this it follows that the contract with the defendants was for a theatrical entertainment on Sunday, and that therefore it was an illegal contract and not enforceable, and therefore no recovery can be had for breach of it by exclusion of the plaintiff from the theater.

#### RIGHTS OF AN ACCOUNTANT REGARDING THE TAKING OF TESTIMONY.

Attorney General Monnett rendered an important decision last Friday regarding the right of an accountant, when directed to make certain investigations authorized by law, to compel the attendance and the giving of testimony of witnesses. As the question of the power of a special accountant in this regard has never been made the subject of judicial decision, therefore great interest will attach to the opinion of the attorney general, as this will be found to be the first formal declaration of the law on this subject.

The opinion was in reply to an inquiry from state school commissioner Corson, whose official duty requires him upon proper application to appoint persons to investigate the management of school affairs in any district, where complaint is made, and as the question of compelling the attendance of witnesses is liable to arise at any time, he desired to ascertain the precise status of the law, so that he would know how to proceed in case the contingency of refusal to testify should arise.

The school commissioner asked for the construction of section 365, of the Revised Statutes as to the power of the accountant to compel witnesses to testify when directed by the school commissioner's department on complaint for the fraudulent use of money. Two questions were presented, *first*, in regards to the power

of the accountant, and *second*, as to the course he should pursue in the event that a witness should refuse to appear and give the testimony required by the above mentioned section.

By section 364, Revised Statutes, when complaint is made in writing, verified by three freeholders, and taxpayers of a school district setting forth sufficient grounds, and demanding an examination of books, accounts vouchers, etc., it is made the duty of the school commissioner to appoint an accountant, who shall visit the school district, take possession of books, and make an investigation of the financial management and condition.

Section 365 authorizes the accountant to call witnesses by written notice, which the attorney general holds, takes the place of a subpoena. He further interprets this section as giving the same powers to the accountant as are vested in a notary public and that the only exception to the rule requiring a witness to testify is based on the principle of law under which no man is bound to criminate himself.

Under section 5253, Revised Statutes, in case of refusal to testify, an attachment may be issued for the arrest of the person so refusing, and should he refuse to testify, he may be fined in a sum not exceeding \$50, or imprisoned in the county jail to remain until he is sworn and testifies or gives his deposition.

The attorney general holds that an accountant appointed under section 364, Revised Statutes, has the authority above stated, and that without it the section would be of no account, and further that the exercise of such authority cannot be construed as a judicial act, and any person refusing to appear and testify before such accountant may be committed for contempt.

#### MODERN ABSTRACTS OF TITLE AS REQUIRED IN OHIO.

[Continued from last week.]

*What estate is conveyed?* The nature of the estate conveyed is usually correctly and sufficiently answered by the words, "fee simple."

To ensure certainty, the whole conveyance should be carefully read, and its true nature ascertained. In answering this question, provisions, conditions, defeasances, reservations and agreements inserted for the purpose of defeating, qualifying, restraining or abridging any estate or interest granted by the deed, should be stated, *verbatim*, to show in what degree and to what extent they may operate, by what mode they may be discharged or avoided; and

if they have been performed or satisfied, the material circumstances should be ascertained and stated, so that an opinion may be formed whether the discharge or performance was duly accomplished.

As the validity, effect and extent of deeds conveying special interests and qualified estates depend upon their provisions, particularity should be observed in giving the words of conveyance, purchase or limitation, the *habendum* with the conditions of grant or restraints upon its use and enjoyment, and the covenants that are contained.

All special matter, including recitals, references, exceptions, declaration of uses, trusts and special agreements, conditions qualifying the grant, limitations restricting its use, should be set forth in the identical language of the deed.

If the deed does not contain the usual words by which a fee is created, as "heirs and assigns" or "executors, administrators and assigns," the omission should be mentioned. Some examiners prefer to have the words of limitation expressed; as to "A, B, his heirs and assigns;" or "A, B and his assigns;" or, "A, B and C, D and the heirs of A, B."

If the deed be in the exercise or execution of a power or trust, the clause referring to such power or trust, should be stated in words as near as may be to the language of the deed, and when such clause is ambiguously worded it should be transcribed literally. It ought also to be stated, when trustees or mortgagees, etc., join in the deed, by and with whose privity, direction or appointment they execute it.

The usual clauses should be examined, to see if they differ materially from the common forms, or contain any qualification or exception, and if so the qualification or exception should be shown. As they are for the most part uniform, in modern conveyances, it will generally be sufficient to know that they are not omitted, or unusual, and unless they are, no reference to them is expected.

The answer to this question, when the deed does not convey an unqualified estate in fee simple, should indicate that the title is imperfect, and the matter explained at the desired length under the head of "*defects*" or at the close of the page, as room may best exist.

*Covenants.* As the covenants of a deed do not change its nature as a conveyance, a quitclaim being as effectual to transfer title as a warranty, if there are no words in the covenant clause restricting the grantor's liability,

the reference to the deed as a warranty or quit-claim will be sufficient. But when the usual covenants differ from the language in which they are ordinarily framed, the difference should be shown.

When the conveyance is in warranty deed form, if any of the customary covenants are omitted; as, of seizin, or of right to sell and convey, or if the agreement to warrant and defend excepts a certain claim, or the clause is otherwise modified, particular mention of the facts should be made.

Should a quitclaim contain covenants, they become material and should be recited, as the instrument in effect may be a warranty, although in the form of a quit-claim. In general, it may be said, that all covenants which may affect the vendee should be given, and especially, exceptions against incumbrances.

#### IS IT PROPERLY EXECUTED AND ATTESTED?

**Execution.** The examiner should examine the signing, sealing and attestation. If the names of the signers are not the same as those mentioned as grantors, or one or more of those named as grantors did not sign, the variance should be noticed.

Seals are now dispensed with by statute in most states, but this does not do away with the necessity of noting the absence of a seal, or its defective use, in deeds of some age.

The examiner is expected to be posted on all changes of law in respect to the execution of deeds, and carefully note everything that made the deed defective at the time of its execution although by reason of a change of law it would be good at a later time, or at the time the abstract is being made.

Extra caution is necessary in deeds of married women, conveyances by attorneys, or on other delegated authority, or of corporations, in order that the abstract may show whether the execution is faultless.

Where an instrument has been executed by an attorney or other agency, the authority should also be abstracted.

**Attestation.**—The matter of attestation is purely statutory, and whether it is defective, is to be determined by reference to the prescribed statutory form, if one exists. The usual words are, "Signed, sealed and delivered in our presence," or, in some places merely "in our presence," followed by the signature of the witnesses. If it is improperly attested the defect should be indicated by prominent words such as "no subscribing witness," or a similar statement.

When the instrument requires attestation by two witnesses to each signature, if any of the subscribers acknowledged at a different time or place, the number of subscribing witnesses to each signature should be stated, when there is not a sufficient number.

**Is it properly acknowledged?** The acknowledgment, to be effective, must conform substantially to the directions of the statute. It should state all the facts necessary to create a valid official act. If the venue is not given, so that the location where the act is done may be known, it should be so stated.

The certificate should show that the instrument was acknowledged, and fix the identity of those who acknowledged. A certificate that does not show that those who executed it were known to the officer as such is defective.

If all of the parties do not acknowledge, or if the grantor's name is not spelled the same as in the context, or is otherwise different than in the deed, mention should be made of the defect.

The acknowledgements of married women, corporations and persons acting by delegated power, or in an official capacity, should be closely scrutinized, and if defective the errors should be pointed out.

Clerical errors are common, and arise mainly in the use of printed forms containing blanks which are improperly filled, or not filled at all.

The official act of a notary should be authenticated by his seal. The officer should state his official title at the close of his signature. The absence of a seal, or official designation should be noted.

**Is separate examination of wife certified.** When the separate examination of the wife is required to be taken and certified by the officer, it is essential to divest the wife of her estate. The importance of this is such that in order that this defect, where it exists, may not be passed over, a special question, is given, which compels the examiner, in order to answer it, to see if this important provision has been complied with.

In case of an acknowledgment without the state where the land is, the abstract should show whether the instrument has a proper certificate of the officers' authority and that the work conforms to local regulations. The form may be "A certificate of authority and conformity by B. clerk of the court of A. county appears," or if such is the case "no certificate of authority appears." But where a foreign notary's certificate is in conformity with local law,

no certificate of authority need be noticed in the abstract.

The certificate of a commissioner for a state, if in conformity to the laws of the state from which he derives his authority, if properly sealed, needs no further certificate.

When the instrument is acknowledged within the state where the land is situated, the answer to this question may be, "yes," or "no," as the case may be. If the latter, the defect should be given where space is left below.

*Before what officer, and where?* In case the acknowledgment has been taken out of the state where the land is situated, the name and official character of the magistrate and the venue should always be given, and it is not out of place when it has been taken within the jurisdiction. The answer should be like this: "John Doe, a Notary Public, Antwerp county, Mich."

*Description of Property Conveyed.* If the parts of a deed were followed in their order in compiling the abstract, the description would be introduced after the words of conveyance, but for convenience, it is placed near the close, where proper space can be had for a long one, when such exists.

The entire description, as set forth in the first deed abstracted, should be transcribed literally. As often as subsequent deeds contain the same description, or one intimately corresponding to it, a short reference is sufficient, without a full repetition. But this practice is dangerous unless the work is done with care, as when any substantial variation or more particular description occurs or any doubt arises as to the identity of the parcels it should be set forth fully.

*Plats.* Space is provided upon each blank for a plat of the parcel under consideration, and is a matter of great assistance to counsel in keeping the different lots in view in passing upon the title, if a plat of the land described on each sheet is prepared, the particular lot being colored distinctively with a pencil. The plat should be repeated on each sheet, notwithstanding that the parcel is the same as the previous one.

Nearly all of the lands in this country were first surveyed by the authority of the state or general government, and divided into rectangular tracts, plats of which became public records. Rural lands, in most instances, are no further subdivided, but in cities, villages and hamlets the original lots have been further cut up into lots and blocks.

Plats are not only desirable as a visual representation of the land the title to which is under consideration, but they often form an important element in both conveyancing and the examination of titles. As lands are often conveyed and described with reference to them, they are an essential feature in preparing an abstract.

Where the description in a conveyance is of a lot by number, the plat of the survey is as much a part of the deed as if set out in it. In such cases the recorded plats should be examined to see if the statutory regulations concerning the certificates of the surveyor and owner are appended.

So much of the recorded plat, in such cases, must be given on the abstract, as shows the relative location, shape, boundaries, etc., of the particular lot or lots under examination and it is generally desirable to show the abutting lots. All premises intended for any street, alley, way, or common, or other public use, on or contiguous to the land conveyed should be shown on the plat.

*What if any defects?* In treating the different subjects in the foregoing paragraphs, defects have been pointed out, which, if at any length, must be described in answer to this question, after a reference to them is made under the title to which they belong.

Other errors that the abstracter should be on the alert for, and note, arise in cases like the following:

Errors in transcribing from the original instruments to the record, by which a disparity of dates occurs; the acknowledgment frequently antedating the execution or registration, or the latter date having priority over both of the others. In such cases the abstract should say, "The following disparities (or defects) of dates appear (naming them)."

A discrepancy in the names intended for the same person often appears, one name appearing in the premises, another in the execution, and another in the acknowledgment, where the grantor's have written their names personally in the signatures, often they are different than where written by the conveyancer. In such cases refer to the error by saying something like "grantors name written — in the body of the deed, and — in the acknowledgment."

Sometimes the name of a grantor who signs is entirely omitted from the body of the deed, or one who appears in the body as a grantor does not sign. Reference to the omission should be made, in such cases.

A misnomer or a difference in spelling is sometimes found, in names that are apparently designed for the same person, when different conveyances of the same property are compared. When these are detected by the abstracter they should be referred to.

When different conveyances of the same property are compared a manifest misdescription of the lands is often revealed. The name of the township, county, or state is sometimes wrong or omitted, or a discrepancy appears in the courses, metes and bounds, or in the number of acres.

Instances also occur where a conveyance appears that is entirely out of line. Defects of this kind should all be clearly described so that counsel can pass upon them.

Sometimes the conveyancer has neglected to fill a space in a printed blank, left for a personal pronoun descriptive of the granting party or parties. Deeds which depart from precedents and the settled use of words are to be carefully examined.

*Explanation.* While it is true, as a general rule, that the abstracter is expected to give only the information contained on the records, yet he should be on the alert to discover all the small and easily overlooked errors and omissions, such as have just been described, and it will often be essential for him to secure affidavits of persons acquainted with the owner, the circumstances of the title, or the locality of the property, explanatory of the situation.

## SUPREME COURT PROCEEDINGS.

### Official Record of Proceedings.

FRIDAY, *December 19, 1896.*

#### General Docket.

3941. The Baltimore and Ohio Railroad Company v. Daniel S. Ambach. Error to the circuit court of Franklin county.

By the Court.

To bring a case within the saving provisions of section 4988, Revised Statutes, a summons must be caused to be issued before the expiration of the statute of limitations governing the cause of action.

Judgment affirmed.

3939. Madison Millhouse v. The Chicago, St. Louis & Pittsburgh R. R. Co. et al. Error to the circuit court of Marion county. Judgment

affirmed for reasons stated in report of this case in 7 C. C. R., 466.

4073 and 4405. Owen Haines et al. v. Henry Reif. Error to the circuit court of Seneca county. Application for rehearing not entertained.

4700. James Röss, Sheriff v. John W. Willit. Error to the circuit court of Franklin county. Dismissed by consent of parties at costs of plaintiff in error.

4958. L. F. Young, v. The Lion Hardware Co. Error to the circuit court of Clark county. Application for rehearing not entertained.

5013. Levi Martin Miller v. The State of Ohio. Error to the circuit court of Seneca county. Judgment affirmed. Time of execution fixed for March 31, 1897. Bradbury, J. I dissent from the judgment of affirmance on the ground that the charge of the court, while in the main, accurate and clear, was so prolix that it probably confused rather than guided the minds of the jury in considering the evidence. Its effect was to make too prominent the rights of the officers in making the arrests, while it failed to entirely cover the vital point in the case, which was that relating to the rights of the accused in the light afforded by the facts and circumstances immediately attending the homicide.

5285. Jacob Karch v. The P. C. C. & St. L. Ry. Co. Error to the circuit court of Greene county. Dismissed for failure to file printed record.

#### Motion Docket.

2800. The State of Ohio ex rel. Atty.-General v. James P. Seward et al. Motion by plaintiff to advance cause No. 5037, on the general docket. Motion allowed.

2801. The Iron Railway Company v. The Lawrence Furnace Company et al. Motion by defendants to advance cause No. 4856, on the general docket. Motion allowed and request for oral argument noted.

2302. Francis L. Hartman v. Samuel A. Hunter, Treas. Motion by plaintiff to reinstate cause No. 4485, on the general docket. Motion allowed.

2803. Charles N. Moss v. The Board of Education of Special School District No. 1, of Huntsburgh township. Motion by plaintiff to reinstate cause No. 5090, on the general docket. Motion allowed by consent.

2804. The C. H. & D. R. R. Co. v. Gerhardt Fathmann. Motion by defendant to advance cause No. 5223, on the general docket. Motion allowed.

2805. George Hartman et al. v. Caroline Sawyer. Motion by defendant to dismiss cause No. 5312, on the general docket. Motion overruled.

2806. John Shook et al. v. Chester Bedell. Motion by defendant for leave to file answer in cause No. 5282, on the general docket. Motion allowed and answer filed.

2807. William Evans et al. v. Michael Riley. Motion by plaintiffs for supersedeas in cause No. 5376, on the general docket. Motion allowed. Undertaking fixed at \$1,000.

2808. James Reed et al. v. The State of Ohio ex rel. Thomas J. McDermott et al. Motion by plaintiffs for stay of execution in cause No. 5388, on the general docket. Motion overruled.

2809. John J. Ramage et al. v. The State of Ohio for, etc. Delaware county. Motion by plaintiffs to dispense with printing record in cause No. 5379 and to hear with cause No. 5369, on the general docket. Motion allowed.

2810. Elmer E. Pearson, Auditor et al. v. H. M. Stephen. Motion by plaintiff to advance cause No. 5385, on the general docket. Motion allowed.

2811. Augustus S. Kiver v. The Leland University et al. Motion by plaintiff to advance cause No. 4393, on the general docket. Motion overruled, the cause having been reached on call of docket, and marked for oral argument.

2812. The State of Ohio v. John W. Myers. Motion for leave to file a bill of exceptions to the court of common pleas of Stark county. Motion allowed and cause advanced.

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## COMMENDATIONS.

The following selections give the pith of some of the many commendatory letters we have received from time to time. Want of space prevents our giving all the letters, and we submit portions of a few of them, as specimens of the whole.

A well known lawyer in Northern Ohio writes:

"The **OHIO LEGAL NEWS**, I believe, is the best legal paper ever published in Ohio."

Another says:

"I have been a subscriber to all the other Ohio law papers published within the last thirty years, and am frank to say that yours is ahead of any one of them."

A leading member of the Cincinnati bar says:

"You have made hustling times with your competitor, and although have made him improve his paper considerably, it is yet far behind yours."

An attorney of prominence at Columbus says:

"I learn that your journal is regarded by the profession as the leading one, and as I desire to keep up with the procession, so I send you my subscription."

A distinguished attorney in Central Ohio writes:

"Allow me to congratulate you on the excellency of the **OHIO LEGAL NEWS**. I consider it the best local law journal in existence today."

A well known ex-judge, upon return to practice, wrote:

"I have become in the habit of relying on your **LEGAL NEWS** to keep myself posted in the matter of current decisions, and items of news, while upon the bench, and I should be unable, while in practice, to go ahead with proper assurance if I did not subscribe for the **NEWS**."

A retiring circuit court judge wrote us:

"You have not only set the pace for competitors, but made it so rapid that they do not appear to be in the race. I am unable to see how a lawyer can be without your paper."

Another member of the bench says:

"Containing, as it does, so many of the current decisions of interest, not published elsewhere, it seems impossible that a lawyer who aims at success can permit himself to go without it."

Another judge writes:

"I like your plan of publishing the decisions. It will be a good thing to furnish the profession with the bound volumes as rapidly as completed. I like, also, the good fat volumes you are publishing."

An able attorney in a prominent inland city writes:

"Your subscribers, so far as I have heard, have nothing but good words for the **OHIO LEGAL NEWS**. Your efforts seem to have met their unqualified approval."

Another well known attorney from an inland city, having been a subscriber for some time writes:

"I take this opportunity to express my great appreciation of the **LEGAL NEWS**. I consider it by far the best legal publication in Ohio, and if you continue to improve as you have in the past year, it will have no superior in any state."

A well known law firm in Northern Ohio writes:

"We find the **LEGAL NEWS** indispensable in our practice. It is a work of superior merit, and the most complete and ably-edited law magazine in the state."

With this number of the *LEGAL NEWS* we close volume four of the Ohio Decisions. Bound volumes will be ready for distribution in a short time.

A warrant of attorney to confess judgment on a note "in any court of record" is held, in *First Nat Bank v. Garland* (Mich.), 33 L. R. A., 83, to be sufficient to sustain a judgment of a court of the state in which the note was made, when sued upon in another state, even if the judgment could not have been confessed outside the state in which the note was made.

One who procures the discharge of an employee not engaged for any definite time, by threatening to terminate a contract between himself and the employer which he had a right to terminate at any time, is held in *Raycroft v. Taylor* (Vt.), 33 L. R. A., 225, to be not liable to an action by the employee for damages, whatever motive may have prompted him to procure the discharge.

A damage suit for \$300, filed by one Maggie Ault, against Jones, Witter and Co., was dismissed last week by Justice Roach, of Columbus. The suit was the result of an attachment brought by the firm against the plaintiff about a year ago, but which was subsequently dissolved. The woman then sued the firm for \$300 damages alleged to have been sustained by the wrongful detention of her household goods which were attached. The justice held that damages could not be awarded unless it was shown that the attachment was a malicious prosecution, and as that was not shown the suit was dismissed.

In another suit presented to the justice by a landlord against a husband and wife, as tenants, in which the plaintiff sought to recover a certain amount of money due for rent, a motion was filed by the defendants in which they sought to quash the service in the suit, on the ground that they do not live together, although they are husband and wife. The claim was made that since the wife does not live in the county there was no service. The plaintiff held that although the wife did not live with her husband, service at his residence was sufficient. It seems that no higher court had ever passed on this question and the justice acting on his own opinion, granted the request of the defendants.

## DISCHARGE OF STAFF OFFICERS FROM O. N. G.

[AN OPINION.]

COLUMBUS, O., December 19, 1896.

*General Henry A. Axline, Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—This department has the honor to be in receipt of a communication from the Adjutant General's office, under date of 16th December, 1896, requesting an opinion in writing in the following matter: "Whether the commander-in-chief is required to discharge a staff officer before the expiration of the term of five years of his commission, simply upon the written request of the appointing officer, without sufficient and satisfactory reasons accompanying the request."

This inquiry is based upon a letter attached thereto, dated 8th December, 1896, addressed to his Excellency, the Governor and commander-in-chief, written by A. B. Coit, colonel commanding the fourteenth infantry, O. N. G., in which communication Colonel Coit states: "I have the honor to most respectfully request that Captain E. A. Everett, inspector of rifle practice, fourteenth infantry, O. N. G., be dropped from the rolls, and that C. W. Wiles, second lieutenant and battalion adjutant, be commissioned captain and inspector of rifle practice of the regiment."

Section 3044 as amended April 18, 1892, provides that officers of the National Guard shall serve for a term of five years, unless sooner discharged. Section 3049 as amended April 27, 1896, provides that an officer may be honorably discharged by the commander-in-chief upon tender of resignation, \* \* \* or if a staff officer, on the written request of the officer appointing him, or upon the qualification of his appointed successor.

As I understand from the facts submitted, Captain E. A. Everett was a staff officer appointed by Colonel A. B. Coit, as inspector of rifle practice, and by virtue of said statute, Colonel Coit, as then commanding colonel, had the right to make the written request for an honorable discharge of such staff officer, and to ask for his successor to be commissioned as such inspector. But such written request, whether accompanied with or without reasons for such request, when placed before the commander-in-chief, leaves it to the commander-in-chief's discretion in the matter of acting on said written request. That is, the commander-in-chief may issue such honorable discharge, or may refuse to issue the same.

Respectfully submitted,

F. S. MONNETT,  
*Attorney General.*

## RIGHTS OF AN ACCOUNTANT REGARDING THE TAKING OF TESTIMONY.

[AN OPINION.]

COLUMBUS, O., December 17, 1896.

*Hon. O. T. Corson, State School Commissioner,  
Columbus, Ohio.*

DEAR SIR: This department has the honor to be in receipt of a communication from you asking for an official opinion in writing on section 365, R. S., especially requesting to know the power of an accountant to compel witnesses to testify when directed by your department on a complaint for fraudulent use of money, first, as to the power, and second, as to the course he should pursue in the event that the witness should refuse to appear and give the testimony required by this section.

Section 364 makes it incumbent on you as school commissioner, when a complaint is made in writing, verified by the affidavits of at least three free holders and tax payers, resident of any school district of the state, and setting forth sufficient grounds and demanding an examination of the books, accounts and vouchers, etc., you are authorized and required to appoint some trustworthy and competent accountant for the purpose of investigating such complaint. And such accountant shall visit such school district, take possession of all the books and papers, vouchers and accounts of such district, and investigate the truth of the allegations of such complaint, and the condition of the school fund of such district.

Section 365 empowers such examiner to call before him forthwith upon written notice, and examine witnesses under oath to be administered by him. And he shall immediately after completing such investigation, report in writing, etc.

Section 2 R. S., requires each person chosen or appointed to an office under the constitution or laws of the state, before entering upon the discharge of his duties, to take an oath of office, and this, I take it, is true, whether the special statute appointing the officer requires such oath or not.

Section 5252 provides, disobedience of a subpoena, a refusal to be sworn except in case of refusal to pay fees on demand, a refusal to answer as a witness when lawfully ordered, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required. The exception to this principle, under the constitution,

would be that a witness is not bound to answer any question that will directly or indirectly criminate himself, and he has a right to determine for himself whether the answer will have that effect. But a witness may not refuse to answer a question pertinent to the issue, on the ground that the answer will tend to disgrace such witness, when it will not tend to criminate him when the witness so testifies.

Section 5253 provides that when a witness fails to attend in obedience to a subpoena, the officer before whom his attendance is required, may issue an attachment to the sheriff, coroner or constable of the county, commanding him to arrest and bring the person therein named, before such officer at the time and place to be fixed in the attachment, to give his testimony and answer for the contempt. If the attachment is not for immediately bringing the witness before the court or officer, a sum may be fixed in which the witness may give an undertaking with surety for his appearance, which sum shall be indorsed on the back of the attachment, and if no sum is so fixed and indorsed, it shall be \$100. And if the witness was not personally served, the court may by a rule order him to show cause why an attachment should not issue against him.

When a witness fails to attend in obedience to the subpoena, the court or officer may fine him in a sum not exceeding fifty dollars, or may imprison him in the county jail, there to remain until he submits to be sworn, and testify or give his deposition. The fine imposed by the court shall be paid into the county treasury, and that imposed by an officer shall be for the use of the party for whom the witness was subpoenaed, and the witness shall also be liable to the party injured for any damage occasioned by his failure to attend, or his refusal to be sworn and testify, or to give his deposition.

It would seem to me that if such accountant was duly appointed and qualified, and complies strictly with the powers and duties imposed under section 364 and section 365, that the written notice provided for in said section supplies the place of a subpoena, and when such subpoena is properly served upon a witness, such witness is bound to appear before such officer, and such officer would have like powers of a notary public under similar circumstances, without such means and powers to enforce the duties devolving upon such examiner, the section would be a dead letter law. It is not a judicial act in the sense of the constitution conferring judicial powers upon the

courts of the state. When the question propounded involves no question of privilege on the part of the witness, it is his duty to answer, if ordered by the accountant to do so. And if he is properly before the accountant under such written notice, and he refuses to answer when ordered by the officer, he may be committed as a contumacious witness, in compliance with the above statute cited for such procedure.

Respectfully submitted,

F. S. MONNETT,  
*Attorney General.*

### WHAT IS THE BEST TRAINING FOR THE AMERICAN BAR OF THE FUTURE?

[By John Randolph Tucker before the American Bar Association at Saratoga, Aug., 1896.]

To determine this problem we must look at the wide and expanding field for the lawyer, whether at the bar or on the bench, in this American Union. The training of the athlete must adapt him for the arena of his conflicts. The functions of the American lawyer must be commensurate with the polity, the civilization and the destiny of the United States, as an unique, political organism, and as a member of the family of nations.

The education of this type of the legal profession demands special methods, and must embrace a greater volume of subjects for study than in any other country on earth.

We have forty-five commonwealths in our Federal Union, with diverse systems of jurisprudence; with all of which no lawyer in either can afford to be ignorant. The citizenship of each state is inter-communicated to and with all the others. We are as one in trade, contract, travel, transportation and thought, through railroads, telegraphs and the most wonderful water-ways. The conflict of jurisprudence of the several states must be so ordered and harmonized in respect of this inter-communion that uniformity of administration shall promote the general welfare of all without injury to the interests of any.

This juridical harmony may and should result from, and despite, the conflict of laws and the diversity of political authority in the several states.

We have as the basis of these diverse politics in some states the civil law; in most states the common law. In the latter equity holds an equal companionship with the common law in the system of judicature; while in the former it is unknown in the state courts; though in

the federal courts equity and law are ever present as distinct systems, under the supreme mandate of the constitution of the United States. It is very obvious that these diversities in fundamental principles of jurisprudence, and this conflict which arises in the federal courts from the constitutional provision referred to, make the education of the American lawyer peculiar, for, while the state courts administer the civil law, by civil law procedure, the federal courts in the same state must administer law and equity as they stand related to the subjects of litigation in those courts.

Then again, this federal judicature is unique. It is the offspring of the federal constitution. Limited in range, it is co-ordinate, sometimes paramount in authority. By virtue of the supremacy of the constitution, the federal court puts its restraining hand on governments and men, on the states in union and the states in their distinct autonomy. This supremacy of the constitutions, state and federal, is an American invention; unknown and almost incomprehensible elsewhere. Though its germ is expressed in Magna Charta, that all contrary to that great charter shall be held of none effect, it has borne no fruit, except in the United States.

But outside of this unique judicature, as to our local and interstate relations, if we shall realize international arbitration as the new arena for the trial of suits between nations, what a field for the American lawyer of the future! Trusting that the time is at hand when the forum will supercede the battlefield; when the occasional arbitrations at Geneva and Paris will become general and fixed; what splendid opportunities for the display of genius as advocates and jurists will be offered to the members of our profession in the future, when law will be administered in the peaceful form of justice, instead of by the bloody assize of brutal war.

These brief suggestions give us an enlarged idea of the broad and momentous duties which the future will exact of our profession, and disclose what careful, philosophic and scientific training must befit the athletes of jurisprudence, in the coming history of our country, in its extraordinary destiny as a constitutional union, of states, and as such, in its important relations to the commonwealth of nations.

Permit me to condense under brief heads the training which these general views indicate for the American bar of the future.

# I. WHAT SHALL THE SCHOOLS TEACH AND THE STUDENTS LEARN?

*First*—That the lawyer as a minister at the altar of justice of the ideal Jus, though the actual Lex, must be trained to believe that his employment is a public duty, primarily to God and his country; not a mere vocation for private wealth or honor; and that his functions as lawyer or judge are to be performed for the promotion of truth and right, and for the defeat of falsehood and wrong. This is the primal lesson.

*Second*—The lawyer should have liberal culture. Is there anything in philosophy or science, in history or literature, he should not know, in order to reach the summit of his noble vocation? I speak now of what is essential to the best training; though much may be impracticable to many whom Providence debars from the opportunities for such training. Let each do his best, in the use of what is within reach, and the profession will rise to the plane of its future duties.

*Third*—As law is an historic science, because every law system has had historic development, the student must be taught and should learn the history of legal science; from its ancient land marks along the pathway of its progress to present conditions. He should be taught and learn comparative jurisprudence, thus broadening his views of his own by comparison with others, and avoiding the narrowness and error which comes from a too exclusive consideration of his own local polity.

The interesting relation between the civil law and the common law, which modern investigation has shown to be closer than at one time was supposed to exist; the derivation of much of the common law from the reservoir of the *corpus juris civilis* and the reflex influence of the common law upon the code and practice of the civilian in our own states, make it important, and essential, where practicable, that each system should be distinctively taught in schools of instruction. Every civilian will be the better for a thorough comprehension of the system of the common law, and *vice versa*; and this is the more important by reason of the fact already adverted to, that common law principles and practice prevail in the federal courts, held in the states, where the civil law is the local system. But the study of the two systems is essential to the thorough training of the lawyer, who, in the comprehension of both, will enrich and enforce each by the scientific contributions of the other,

and make himself thus a more profound and philosophic jurist. This view is gaining ground in all our schools, and when fully carried out will be of great consequence in promoting the learning and efficiency of the profession in our country.

*Fourth*—It is hardly necessary to say that the activities of our wonderful American civilization in commerce, foreign, interstate and internal; in mining, manufactures and agriculture; in invention and authorship; in contracts, from the simple assumpsit to that infinite variety of negotiable instruments which exchange the moneys of 70,000,000 of people *inter se* and with foreign lands, as winged "carriers without luggage," and in contact by the free and unobstructed intercommunication of this body of people in forty-five distinct states; in the endless forms of corporate enterprises for municipal, eleemosynary and industrial purposes, make thoroughness of instruction in the law of real and personal property, of domestic relations, in the law of corporations, commercial paper and the like essential to the fitness of the ordinary lawyer for the simple and usual duties of his calling.

*Fifth*—But more important still. We live in a federal union of forty-five commonwealths, which union is formed by a constitution, the supreme law of the land, and each state with its own constitution, the supreme law within its own borders. Constitutional law is, therefore a special theme for the lawyer of the United States, for, on the integrity and supremacy of these constitutions over men and states, and governments, state and federal, depend the perpetuity of our union and the security of our liberties as men.

In this the student needs most careful training. He must be educated in the history of social and political science, the history of the polity of other countries, especially of British institutions, which are the evolutes of historic struggles, the monumental trophies of liberty against prerogative, and embody the unwritten but organic constitution of England; and this, especially the last, as essential to the comprehensive understanding of our own constitutions, which are but bundles of the institutional liberties of the English people. He must study the federal constitution in the broad light of its historic formation, from colonial subordination, through the ephemeral continental congressional era, and that of the articles of confederation to the consummate union under the constitution of 1789. This is his personal duty, because he is, as a sworn

minister of the law, bound to a faithful support of the constitution, and as a patriot citizen to defend and uphold that constitution as the axis of the liberties of the people.

This is an unique study for the American lawyer, and demands of him a conscientious devotion to it, as a defender of its sacred provisions against error and usurpation, and a supporter of its true meaning, as essential to the preservation of our free institutions.

*Sixth*—But one more subject I must mention. The foreign commerce of the United States binds her to the peoples of the world. In fifty years this continental republic will stand in such relations to Asia and Europe as will make international law a code for the commonwealth of nations; and must establish international tribunals to decide in peace questions of immeasurable consequence to us and the world.

Let the schools train our lawyers in this magnificent field for the widest speculation and the most profound study. It is too much neglected. In the culture of this field by the student, history, philosophy, in all its departments, and comparative jurisprudence in all the ages, must be opened for his exploration, to fit him to act well his part in the forum of the world.

This is an epitome of what the lawyer of the future should be trained to learn.

## II. HOW TO BE TAUGHT. HOW TO LEARN.

I premise. All will be in vain, unless so taught as to be a self teacher. We must teach him how to teach himself.

In detail I answer:

*First*—By the best text-books, which shall precisely state the law as it has been settled by statute and adjudications. This, I must think, is best in the first stages. Teach principles by a leading case, it may be, without at first crowding on the mind more than the jural principle, illustrated by more and juridical examples.

*Second*—In connection with this lectures full and free, showing the natural and moral foundation for the principles, or the historic origin of what is arbitrary, and may seem contrary to morality or reason.

I believe in lectures alone with text-books; not on them so much as parallel to them, and embodying the views of the teacher and of other authors. The student takes in by the spoken word of a good teacher what he never derives from the written words of the best author. They work well together.

*Third*—By the use of cases, leading and illustrative of the doctrine in hand.

As a practical question, it may be left to the teacher to decide whether the study of cases, so admirably enforced on the original suggestions of the eminent Prof. Lardell of Harvard, should be contemporaneous with the study of text-books, defining and settling general principles, or be deferred to a quasi post-graduate course at a later period.

It is perhaps not a matter for dogmatic decision, but I am inclined to think where the course is extended over a number of years, it will be best to ground the learner in principles, extracted from the cases by the text writer or the professor, primarily, and then to enlarge and expand his knowledge by an analytic teaching from cases.

The students thus gets a map of the whole system at first, and may thereafter devote himself by a more precise and fuller examination of illustrative cases, to the application of these principles in detail, to such cases as have arisen in the courts of England and America. Either method would embrace the "Case System," but the difference suggested is as to the period at which the "Cases" are to be used.

*Fourth*—In America, owing to our interstate or federal system, the subject of "Conflict of Laws," the title of Judge Story's valuable treatise, or of "Private International Law," the title of Dr. Francis Wharton's later work, and of other English books on the same subject, is a matter which should be carefully taught in all our schools.

It relates to rights and interests of individuals, arising under the diverse laws of different states and countries, and is of great practical value for the American student, as well as of great interest in its relation to the philosophy of interstate or international jurisprudence.

In this broad and ever-widening field for judicial duty in this country, so unique in its political organism, and so closely related to the world's destiny, the teacher must inspire the student with a deep sense of his duty for full preparation for the immense work before him.

All lawyers may not be called to the discharge of the highest functions of the profession, but all should be so fitted to apprehend them that the bar, as a whole, will be qualified to meet the demands made upon it in all the departments of jurisprudence.

The general education of all should be such that the pre-eminent men for the highest func-

tions shall be trained and recognized for the destiny which opens to the American bar of the future as the administrators of law in its best sense, by the adjustment of subjects of litigation, from the simple contests of the ordinary courts to those higher conflicts which involve the integrity of a constitutional system of government or the peace of the world in the arbitration of a lis between nations.

*Third*—What time should be prescribed for legal training?

From what has been said, life is the limit of that self-training for which the schools must adapt the learner. Schools cannot make a lawyer. They can only help him to make himself a lawyer.

A year ago Mr. Justice Brewer said here that his own legal education was far too short a time to fit him for his profession. I could not but feel that he himself was full proof that "time was not of the essence of the training." On the highest bench of the country, as an arbitrator to-day of an international conflict, he has by self-training been made preeminently fit for the highest functions of his profession.

Before there were any law schools there were lawyers as great as any trained by such schools. The original work of the self-trained bar of all countries stands in vindication of this statement. The Mansfields, the Hardwicks, the Eldons of England, the Marshalls, the Kents, the Gibsons of America, are the men of might in the profession, who by self-training reached eminence to which our pupils may nobly, but, in most cases vainly, aspire.

The result so much desired is from the struggle of the individual, by original thought and intense self-training. Professors must teach the man to think out the law for himself. We cannot teach him the law by rote. He must make it his own by assimilation.

When it is said we should have a prescribed time for student life I feel there is force in the proposition. Time is needed, beyond doubt, to go through such a course as I have indicated. I concede three years is better than two, and two than one. I admit one year, two years, is too short a period for such a course—nay, I would prefer four, five years to three.

But we must cut our coat according to our cloth. Thousands of men like Mr. Justice Brewer must take what time they can afford to devote to study. His age, his means, may limit him as to time. In my own part of the

union this is the case. Shall we prescribe such a long period, that we can give a student who must take only a year or two years, no memorial of his work in the form of a collegiate degree? My own experience has taught me the merit of the work depends more on intensity than extensity of work. The one year man, by self-devotion, will often achieve more than the three years' man. It is true the former in a three years' term would show more notable results; but train him aright in the one year he can devote to it, and he will take two years of self-training after leaving you, which will put him far ahead in the race for eminence.

These views have led me, while urging upon all a longer course than one year, to adapt my teaching to laying such a foundation of legal principles, based on moral truth and leading cases, as will put the young man in condition for such self-training for life as will insure to him the eminent ability that will fit him for the most exalted duties of his great calling.

Such training has made the great judges, from Marshall to Brewer, from Sir Edward Coke to Lord Russell.

Let me suggest that diverse grades of degrees might be adopted to measure the amount of scholastic training the law school has furnished to the student: Proficient in law; bachelor of laws, master of laws. Each student would thus adapt his time to his necessity, and win the degree, which fairly measures his scholastic work. Besides, the shortest time might be devoted to the grounding in the principles of the law, and the longer time to the precise and scientific study and analysis of cases.

In all this I speak very much from the conditions of students which confront us in the field of my own labors as a teacher.

This condensed statement of the field that stretches before the profession to-day in the great future of our own country, and of the method and measure of study for our bar, is too brief to be satisfactory to me, or to this learned body. If its suggestions can be made of any use, I shall feel that it may not be without some value. In all that can conduce to make the American bar a co-equal worker with the English bar in this great common destiny in the future, I am glad to be with you in co-operation, as I am in cordial sympathy.

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## COMMENDATIONS.

The following selections give the pith of some of the many commendatory letters we have received from time to time. Want of space prevents our giving all the letters, and we submit portions of a few of them, as specimens of the whole.

A well known lawyer in Northern Ohio writes:

"The OHIO LEGAL NEWS, I believe, is the best legal paper ever published in Ohio."

Another says:

"I have been a subscriber to all the other Ohio law papers published within the last thirty years, and am frank to say that yours is ahead of any one of them."

A leading member of the Cincinnati bar says:

"You have made hustling times with your competitor, and although have made him improve his paper considerably, it is yet far behind yours."

An attorney of prominence at Columbus says:

"I learn that your journal is regarded by the profession as the leading one, and as I desire to keep up with the procession, so I send you my subscription."

A distinguished attorney in Central Ohio writes:

"Allow me to congratulate you on the excellency of the OHIO LEGAL NEWS. I consider it the best local law journal in existence today."

A well known ex-judge, upon return to practice, wrote:

"I have become in the habit of relying on your LEGAL NEWS to keep myself posted in the matter of current decisions, and items of news, while upon the bench, and I should be unable while in practice, to go ahead with proper assurance if I did not subscribe for the NEWS."

A retiring circuit court judge wrote us:

"You have not only set the pace for competitors, but made it so rapid that they do not appear to be in the race. I am unable to see how a lawyer can be without your paper."

Another member of the bench says:

"Containing, as it does, so many of the current decisions of interest, not published elsewhere, it seems impossible that a lawyer who aims at success can permit himself to go without it."

Another judge writes.

"I like your plan of publishing the decisions. It will be a good thing to furnish the profession with the bound volumes as rapidly as completed. I like, also, the good fat volumes you are publishing."

An able attorney in a prominent inland city writes:

"Your subscribers, so far as I have heard, have nothing but good words for the OHIO LEGAL NEWS. Your efforts seem to have met their unqualified approval."

Another well known attorney from an inland city, having been a subscriber for some time writes:

"I take this opportunity to express my great appreciation of the LEGAL NEWS. I consider it by far the best legal publication in Ohio, and if you continue to improve as you have in the past year, it will have no superior in any state."

A well known law firm in Northern Ohio writes:

"We find the LEGAL NEWS indispensable in our practice. It is a work of superior merit, and the most complete and ably-edited law magazine in the state."

A man in Augusta, Me., has been sentenced to jail for thirty days, for a premature sleigh-ride. The learned judge, who tried the case, held that it was cruelty to the horse and no pleasure or benefit to the man.

A rather peculiar and unprecedented suit was filed in the Delaware common pleas court last week by Dr. Henry Besse against L. P. McMaster and others. It seems that Dr. Besse is Delaware county's great bee man. He has one hundred stands of bees, and in his petition he alleges that they were robbed of their winter's storage by the destruction of his white clover by the defendants.

It has been announced that Judge Thomas M. Bigger of the police court of Columbus, will, within a few days tender his resignation as police judge to Governor Bushnell, to take effect January 15. So far as known Samuel Swartz is the only candidate for the place, and will undoubtedly secure the appointment. Judge Bigger will succeed Judge Duncan on the common pleas bench on February 9, and wishes to become fully acquainted with the court procedure before he assumes his new duties.

Judge Taft has designated Judge Hammond to close up the business in the United States courts at Toledo, for the present term. For that purpose Judge Hammond will attend and continue until all business is disposed of.

By order of Judge Taft and Judge Ricks, the rules as to assignment and trial of cases have been so far modified as to provide that "all cases at issue, whether noticed for trial under rule No. 52, or not, will stand for trial when reached, unless good cause for continuance is shown," also that "rule No. 45, as to continuances will be enforced."

It therefore follows that counsel must be prepared and ready for trial when their cases are called.

Judge Newby, of Hillsboro, last week, decided a case in which the question as to the right of the county commissioners to elect a superintendent for the London public schools was involved, the school board having failed to agree upon the selection of one. A petition was presented the commissioners and that body, after giving all parties a chance to be heard, elected Prof. J. W. Mac Kinnon, who had been superintendent of the London public schools for the past 19 years. The members of

the board which had been fighting Mr. Mac Kinnon, instituted proceedings in the common pleas court. The decision of Judge Newby is quite lengthy, and in concluding his decision he said; "My conclusion is therefore that the commissioners had the power to take the action they did if they found the facts to exist, which under the law, made it their duty so to act."

### THE NEW COURT HOUSE AT TOLEDO.

Lucas county has just completed a new court house, and on New Year's day the building was opened for public inspection. It is a magnificent structure, and its handsome exterior is built entirely of Berea stone. Its floors are of marble, Romanosaic style, walls waincoted with marble and stairs in "old statuary," with marble treads, are all in keeping with the dignity and beauty of its exterior. The building is 250 feet in length by 130 feet in width, and is three stories and basement high. The plan of occupancy is, first floor principal county offices, including office of probate judge; second floor, clerk's, sheriff's and prosecutor's offices, and the four common pleas rooms; the circuit court, law library, court stenographer and a large assembly room occupy the third floor. The court rooms, with lofty paneled ceilings, are commodious and richly furnished. The whole building is fire proof, and is ventilated and warmed by the fan system.

Several of the handsomest office buildings in the state have been erected in Toledo within the last few years, and the people of that fair metropolis may now be congratulated upon having one of the finest public buildings in the west. They may also be congratulated upon having secured it through faithful officials, at a cost considerably within the original appropriation, which was \$500,000.

### STATE BAR JUDICIARY COMMITTEE.

The judiciary committee of the State Bar Association was in session last week, in Columbus, at which all the members of the committee were present, as follows: Attorney General Monnett; Warner M. Bateman, Cincinnati; John A. Shauck, Dayton; S. S. Wheeler, Lima; William E. Cushing, Cleveland; John N. Van Deman, Washington, C. H.; A. R. McIntire, Mt. Vernon; Judge A. C. Thompson, Portsmouth; Gilbert D. Munson, Zanesville; Judge George K. Nash, Columbus and E. H. Fitch, Jefferson

To this committee is referred the indorsement or rejection of the various recommendations for changes in existing laws.

It has become customary with the bar association to accept the judgment of this committee as to what changes should or should not be made in existing statutes. To each member of the committee is allotted his equal portion of the work, and each member then has to report to the whole committee what action he recommends upon the measures intrusted to his consideration.

Foremost in importance among the various recommendations submitted to the committee at its recent session was the report of Secretary Cushing, in which he urged the necessity of establishing a uniformity in law and procedure among the several states in the Union. While the same civil laws are similar in many respects, yet there are a number of essential points in which differences occur. This discrepancy occurs in a more or less pronounced form in nearly all the states. A uniform code of laws and a uniform method of legal procedure is deemed by the association to be of inestimable advantage to the profession generally.

### THE JUDICIARY

[Address of Hon. Virgil P. Kline, of the Cleveland Bar, before the third annual meeting of the Ohio State Board of Commerce, Columbus, Ohio, December 9, 1896.]

The Constitution of Ohio, under which the state grew and prospered for nearly fifty years, with a judicial system then admirably adapted to the condition of our people—a system that created such lawyers as Burnett, Goddard, Ewing, Loomis, Stanberry, Wood, Tappan, and a large number of other men noted in the annals of Ohio and its bar—was superseded in 1851 by the new constitution, the work of able men, many of whom were equally as great and celebrated as those above named.

The system inaugurated by the new constitution perhaps at the time of its adoption was the best for the state that could have been devised. Indeed, many of the present evils resulting from legislation, some of which have been pointed out by the gentleman who opened the discussion, Mr. Dexter, of Cincinnati, are the result, if not of open, at least of covert violations of that instrument. The late Judge Ranney deservedly took great pride in his labors

in the formation of the present constitution, and to the day of his death that instrument was to him as dear as ever was the constitution of the United States to its great defender, Daniel Webster.

But as the state outgrew the judiciary system of 1802, so the reorganization of the courts in 1851 was demanded and deemed essential for the speedy and due administration of justice. Now, in 1896, nearly forty-five years since the adoption of the constitution of 1851, we find that the increasing population of the state, now nearly two millions more than then, has made essential the reconstruction of the judicial system of our state, if not a radical change therein. Our corporate institutions have vastly increased, our manufacturing industries have grown to very large proportions, our commerce on lake and rivers and our railroad transportation have achieved an importance that can hardly be calculated. Litigation proceeds from most unexpected sources, and the system that was useful to the state forty-five years ago, when steam, electricity and other modern inventions were not thought of, or only in their infancy, is not at all adequate to present development. The garment that was cut for the boy does not fit the man.

The system we have now is cumbersome and awkward, the administration of justice is slow and expensive. Bills of exceptions, new trials, reviewing courts, make the law's delay tedious to litigants and burdensome to the people. I have no intention of impugning the honesty, the sincerity and the learning of the very many judges—good ones and painstaking ones, too—who administer our system, but I am convinced that something must be devised to facilitate a disposition of the ever increasing accumulation of business before our courts.

Our judicial system in Ohio is a costly one; with six supreme judges, twenty-four circuit judges and eighty-five common pleas judges in the state, the total salaries paid them by the people and tax-payers reach to the enormous sum of nearly \$430,000. This does not include the salaries or fees paid to the probate judges and superior court judges. And yet the sum paid our judges is less than it should be in order that the very best talent of the bar of the state should be attracted to the bench. Our supreme judges do not receive a compensation that the importance of the high position demands, and yet the history of the court shows that there never has been a decision made that could be traced to dishonest

motives or corrupt desires. There never have been any grievous usurpations of power on the part of any judge, supreme, circuit or common pleas, so far as I have knowledge, that have lessened the confidence of the people in the judiciary. An honest judiciary is the sheet-anchor of the people and a ready and quick acquiescence in its unbiased decision is the surest guaranty of the perpetuity and tranquility of our free institutions.

The system in Massachusetts of one chief justice at \$7,000 per year and \$500 for traveling expenses, and six associate judges at \$6,000 with \$500 for traveling expenses, has enabled the old Bay state to always have judges of the highest character and greatest attainments. In Massachusetts they are not elected by the people, do not have to get down into the arena of party politics, but are appointed by the governor, with the confirmation of the senate. Their offices are held during good behavior. They may be removed by the governor by and only with the consent of both branches of the general assembly. The total system of judiciary in Massachusetts, which has about three-fifths of the population of Ohio, many large cities and manufacturing institutions and necessarily much litigation, costs in the salaries of its officers only \$161,500.

The judges in New York and Pennsylvania get longer terms and better salaries than in Ohio. In Pennsylvania the supreme judges are elected by the people, and hold their offices for twenty-one years, unless sooner removed, but are ineligible after serving the twenty-one years. The annual salary of the chief justice is \$8,500, and that of his associates is \$8,000.

Complaint is made in the state of Ohio, not only of the expense of litigation, but of the delays incident thereto. It is a noticeable fact to anybody familiar with the character of causes in our courts that suits growing out of contracts—litigation between business men—form but a small part of the cases which the courts are called upon to try. Damage cases, slander, libel, personal injury cases—cases largely of a speculative character—choke and encumber the calendars of the courts.

"In a majority of the states," says Mr. Russell, of Michigan, in his admirable address before the American Bar Association, "legislation has placed the profession on the basis of any business calling, and has put the law concerning maintenance on the same basis with the law of other ordinary contracts. Statutes in many of the states permit the lawyer to make any contract he sees fit with his client for com-

pensation, and it may be contingent upon his success, and it may be paid out of the proceeds of litigation." While we have no such statute here, and the general sentiment of our courts, when tried, is against such contracts, the privilege, however, we all know, is exercised by attorneys, and thus many cases are brought before the courts upon agreements for contingent fees, many of them without actual merit, brought by lawyers anxious for the remuneration they will receive without reference to the justice of the case. These antecedent bargains are the cause of our generally heavy dockets, and the number of such causes is a barrier to the prompt adjudication of really meritorious and necessary cases. Such statutes where they exist and the privilege enjoyed by counsel here really permit attorneys to become a medium of delay, and thus necessitate a loss of time of the courts in the speedy adjustment of difficulties. Lawyers themselves should be held responsible for this state of affairs. The delay to suitors who have cases of material interest, by having the dockets encumbered with agreement cases, is a radical evil that must present itself to the mind of every one.

Again, a very general and wide spread distrust of our jury system, so far as it applies to civil cases, is beginning to make itself manifested. Should the decision of some twelve men, brought together in a heterogeneous mass from all classes of society, very often by a political arrangement made to pay political debts, be looked upon longer with more reverence than that which would be made by a trained mind, accustomed to the dissection of peculiar and intricate cases? The best of our citizens, the men of thought and character, men equal to a fair and honest decision of any commercial or business problem, are not the men who are jurors. They seek to avoid this great public duty, and generally succeed, and it is the hand to hand man, the man without a job, who seeks to be on the jury. I know our jury system is imbedded in the minds of the people as a part and parcel of their liberties, yet the conclusions often reached by jurors, the manner in which they reach them, are a matter of ridicule in almost every community. The business man, if he has an important case in court and has faith in his cause, would rather risk the decision of the matter involved with a judge of probity and experience than to take his chances before a jury with its compromises, its favoritism for parties, with the eleven obstinate men and the one who knows it all. Properly enough we may have grea

respect for traditions, but when we are confronted by the practical difficulties of delays, uncertainties, reversals and expense incident to an adherence to the venerable jury system, we are cured of some regard and enthusiasm for it.

Yet I would never disturb the trial by jury in criminal cases. It has served the cause of human liberty against the aggrression of power in times past, and it may be called upon to do it again. In the language of Judge Black: "It is the best protection for innocence and the surest mode of punishing guilt that has yet been discovered."

It was some years ago that an eminent Englishman declared in one of his speeches that the American legislative system cost more than the British civil list, from which he argued that a republic is much more costly than a monarchical form of government. It may be said, and truly, that our judicial system is much more costly than that of England, and its courts surpass ours in certainty and exactitude of justice, with such promptitude of administration as to reduce the litigation of a naturally pugnacious people to a comparatively small compass. There is not such an enormous mass of legal experiments resorted to in the courts of England as in this country. The three superior courts of Westminster, consisting of five or six judges each, carry along the entire law litigation (as distinguished from the equitable) of all the people of England, and this efficiency is illustrated by the fewness of appealed cases. In commenting on this fact, a writer in one of our popular reviews says: "This extraordinary fact is the most conclusive demonstration of the respect which is paid by the bar and people to the English courts—a respect so practical in its effects as to secure the belief that the decisions are ordinarily the true exposition of the law, from which it would be folly to appeal, and not mere stepping-stones to the court of last resort. Now, if any person going into a court room will contrast the value of the time lost by jurors, witnesses and suitors, and the amounts paid for retainers, counsel fees, witnesses, mileage, printing, etc., with the salary of the judge who sits on the bench, controlling the complicated machinery below, he will perceive that dollars and cents, paid from the treasury, form really the smallest item of the expense which a nation bears in carrying on the administration of justice. Hence, we can hardly value too highly a judicial system which by rendering law certain,

which simply means settled and known, shall prevent litigation; and we can hardly censure too sharply a system by which uncertainty of administration causes men to invest in the chances of litigation and risk the outlay of additional costs, as men risk the price of a lottery ticket."

Our judges should have longer terms and larger pay, such as will bring to the bench men whose decisions will ever be respected. The overworked and unpaid judges are usually tempted to get into a rut of indifference, and to give to questions that come before them scant consideration. An incompetent judge is an expensive officer, only bewildering to counsel and causing more suffering suitors.

If we are to retain our present system of the administration of justice, I think that the right to go to a reviewing court by appeal or error should depend upon the amount involved. When a man has occupied the attention of a common pleas judge and jury over a question involving 500 dollars, he probably has had as full and fair an opportunity as can be afforded for the adjudication of his rights. The judge who sits upon the trial of a cause and hears it all, is better qualified, if fit for his office, to decide upon the questions that arise in it than any other court can ever be. It is difficult in many cases to get it upon paper so that it will appear to the reviewing court as it appeared to the court below. Many circumstances which rightfully influence the decision will be lost through accident or negligence or the imperfection of language. But to permit all cases to go on error, though they originate with a justice of the peace, through to the supreme court, irrespective of the amount involved, imposes a very extraordinary burden upon our judicial system.

Again, a limitation upon the right of review in the supreme court, on error from the circuit court, determined by the amount involved, would be desirable in relieving our supreme court.

Nothing is so expensive as the cheap administration of justice, because there never will go with it that confidence and certainty without which, in one form or another, the same questions will be presented over and over again, to be interminably litigated, argued and again decided.

I would, therefore, suggest:

1. A longer tenure of office to our judges in the court of last resort. Good salaries that will command first-class ability and invite, therefore, the best talent from the bar to crown

a professional career with a term of judicial usefulness.

2. The right of appeal on error limited by the amount involved.

3. If not the total abolition of the right of trial by jury in civil cases, its privilege to litigants at least to be under the discretion of the court. If this is too radical, unanimity should no longer be required to reach a verdict.

These suggestions, hurriedly submitted, are thrown out for the purpose of inviting discussion and consideration, and not as a dogmatic solution of evils which judges, lawyers, and many other citizens agree exist in our judicial system.

## SUPREME COURT PROCEEDINGS.

### New Cases.

New cases filed in the supreme court since Dec. 16, 1896.

5380. The State of Ohio ex rel. Attorney General v. Walter D. Guilbert, Auditor of State et al. Mandamus. F. S. Monnett, Attorney General for plaintiffs.

5381. The Cincinnati, Hamilton & Dayton R. R. Co. v. Ada Cromley, Admx. Error to the circuit court of Hamilton county. Ramsey, Maxwell & Ramsey, for plaintiff. John W. Wolf and Thomas L. Michie, for defendant.

5382. Mary A. Sampson v. The Mutual Building & Investment Co. Error to the circuit court of Cuyahoga county. William Howell, for plaintiff. Morris Black, for defendant.

5383. William A. Hunter v. Dennette Hughes Hunter. Error to the circuit court of Sandusky county. Richards & Heffner, for plaintiff. J. H. Rhodes and Garver & Garver, for defendant.

5384. Charles C. Wood et al. v. The W. & L. E. Ry. Co. Error to the circuit court of Belmont county. W. B. Francis, for plaintiff. Swayne, Hayes & Tyler and George Duncan, for defendant.

5385. Elmer E. Pearson, Aud., et al. v. H. M. Stephen. Error to the circuit court of Miami county. McMahon & McMahon and Long & Kyle for plaintiff. A. F. Brommhall, for defendant.

5386. The City of Cincinnati et al. v. Henry Emerson. Error to the circuit court of Hamilton county. Frederick Hertenstein, Corporation Counsel, for plaintiffs. Hollister & Hollister, for defendant.

5387. Albert W. Kennon, Trustee, v. William Jones. Error to the circuit court of Belmont county. T. W. Shrove and A. W. Kennon, for plaintiff. F. R. Sedwick, for defendant.

5388. George Zellers et al. v. Francis Felix. Error to the circuit court of Cuyahoga county. Walter J. Hamilton, for plaintiffs. Wilson & David, for defendant.

5389. Th. State of Ohio ex rel. Attorney General v. The Cleveland Ohio Mutual Live Stock Insurance Association. *Quo warranto*. F. S. Monnett, Attorney General, for plaintiff.

5390. The Union Central Life Insurance Co., v. Mollie E. Hanselman. Error to the circuit court of Brown county. White & Campbell, and Ramsey, Maxwell and Ramsey, for plaintiff. Moore & Parker, for defendant.

5391. Henry Fleutke v. Wm. M. Bell et al. Error to the circuit court of Hancock county. Jason Blackford & Byal, for plaintiffs. George H. Phelps for defendants.

5392. State of Ohio ex rel. The Prudential Insurance Co. v. Charles Evans, Judge. Error to the circuit court of Hamilton county. A. C. Shattuck, for plaintiff. Charles Evans for defendant.

5393. Eliza Graham et al. v. Michael Burggraf. Error to the circuit court of Anglaize county. Gocke, Culleton & Smith, for plaintiffs. Sayton & Stueve and W. H. Cunningham, for defendant.

5394. Yellow Popular Lumber Co. v. William Coe. Error to the circuit court of Lawrence county. John Hamilton, for plaintiff.

5395. Yellow Popular Lumber Co. v. Frederick Steidle et al. Error to the circuit court of Lawrence county. John Hamilton, for plaintiff. W. D. Corn, for defendants.

5399. George W. Settle et al. v. H. B. Odenkirk et al. Error to the circuit court of Wayne county. John McSweeney and Hiram Swartz, for plaintiff. Johnson & Taylor and Adair & Adair and E. W. Newkirk, for defendants.

5401. The Wabash R. R. Co. v. The Mitchell & Rowland Lumber Co. Error to the circuit court of Lucas county. Alex. L. Smith, for plaintiff. Cummings & Lott, for defendant.

5402. Jay L. Athey and Frank E. Bliss v. Anna Cooper. Error to the circuit court of Cuyahoga county. Wilcox & Collister, for plaintiffs.

5403. Walter L. Marien by Clarence M. Jones, his guardian v. The Columbus Street Railway Co. Error to the circuit court of Franklin county. S. N. Owen and Fred C. Rector, for plaintiff. H. J. Booth, for defendant.

5404. John S. B. Matson v. Malvina Myers et al. Error to the circuit court of Richland county. Skiles & Skiles, for plaintiff. J. C. Laser, for defendants.

5405. The Supreme Council Catholic Benevolent Legion, a corporation, v. Louisa McGuinness. Error to the circuit court of Cuyahoga county. Meyer & Mooney, for plaintiff. Blaudin & Rice, for defendant.

5406. Sarah Morris et al. v. Mary J. Ackeson et al. Error to the circuit court of Clark county. Pringle & Johnson, for plaintiffs. John L. Zimmerman and Oscar T. Martin, for defendants.

5407. Elisha Brigham Durfee v. Neil Nicholson Mac Neill, Exr. Error to the circuit court of Marion county. Scofield, Durfee & Scofield, for plaintiff. J. F. McNeal & Sons, for defendant.

5408. M. W. Jeffries et al. v. Frank W. Lindsey et al. Error to the circuit court of Franklin county. E. E. Corwin and James Caren, for plaintiffs. Alberry & Dillon, for defendants.

5409. William F. Gass v. The United States Life Ins. Co. Error to the superior court of Cincinnati. Burch & Johnson, for plaintiff. Ramsey, Maxwell & Ramsey, for defendant.

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The United States supreme court, in an opinion rendered by Justice Gray last Monday, held that an application for an injunction against an executive officer of the government was vacated by his death or resignation.

Governor Bushnell late Wednesday afternoon appointed Mr. Sam Swartz, of Columbus, as the successor of Judge Bigger in the police court. Judge Bigger will soon assume his duties as judge of the court of common pleas.

Judge Kohler of Akron has overruled the motion for a change of venue in the case of Romulus Cotell, and set the trial for Feb. 8. Cotell was convicted of murdering the Stone family at Talmadge last March and was sentenced to hang Nov. 9, but was granted a new trial by the supreme court.

A new law firm composed of three well known attorneys has been formed in Sandusky. The new firm is to be known as Wickham, Guerin & Colver. They will occupy the entire second floor of the Donahue block where the firm of Hull & Guerin have been located. Judge Wickham is at the head of the firm of C. P. & L. W. Wickham of Norwalk, and has been on the judicial bench one term and in congress two terms, and is an attorney of exceptional ability known throughout northern Ohio.

The constitutionality of the Garfield law was recently passed upon by Judge Dissette of the Cuyahoga common pleas court. The point raised was by demurrer which was overruled. The demurrer was based on the ground that the law designates a clerk of the county with whom a statement of the candidate's expenses are to be filed and that as there is no such party known to the laws of the state or the constitution as the clerk of the county, that therefore the law is unconstitutional. To the point raised by the demurrer, the court held that there were many statutes mentioning the clerk of the county and that in every instance the clerk of the common pleas court was meant. The decision of the judge virtually declares the law to be constitutional.

Governor Bushnell this week appointed D. W. Jones, of Gallipolis, common pleas judge in the third subdivision of the seventh judicial district. The appointee will succeed Judge W. G. Sibley, who has been elected to the circuit bench. The appointment under the law is until the next general election in the fall, when in all probability Judge Jones will be chosen as his own successor.

Norton T. Horr, and Harrison J. Uhl, have formed a partnership for the practice of law under the firm name of Horr & Uhl, with offices at 922 Garfield building, Euclid Avenue, Cleveland, Ohio.

W. W. Boynton, of the recent firm of Boynton & Horr, will remain with the new firm until their present pending business is disposed of.

#### THE LIABILITY OF A FORWARDER OF COLLECTIONS FOR ACTS OF HIS CORRESPONDENTS.

[BY WILLIAM A. WAY OF THE PITTSBURG BAR.]

With an ever-increasing facility for communication and transportation comes a corresponding increase in the amount of business transacted between widely distant points, and in the number of credits arising therefrom. The liquidation of these credits forms an important branch of commercial business, and is effected in various ways. The simplest and least expensive method for the creditor is by collecting through the banks. Another, and, in case of the debtor's anticipated insolvency, a far more effective plan, is to place the account in the hands of an attorney, or a so-called "commercial agency." These and other methods of collecting claims against debtors at distant points have given rise to the class of commercial agents known as "forwarders," whose contract is to take the matter for collection and use the necessary means to present it to the debtor's attention. In so doing they incur various obligations to the creditor, such as the observance of good faith, making prompt reports, punctual remittances and the like, of which it is not the present purpose to treat.

The subject here proposed for discussion is the extent of the forwarder's liability for the acts of his correspondents. It should be premised that the contract between the creditor and forwarder is a simple contract of an agency, and subject to its usual principles. One of

these is that "if a principal constitutes an agent to do business, which obviously from its very nature cannot be done by the agent otherwise than through a substitute, or if there exists in relation to that business a known and established usage of substitution, in either case the principal would be held to have expected and have authorized such substitution." (Parson on Contracts, 7th Ed., p. 84.) On the other hand, "a substitute of an agent, who had no authority to appoint him, cannot be held as agent of the original principal, but is only the agent of the agent who employs him, and who is accordingly his principal." (Ibid.) And, of course, the original agent is responsible for his acts. It will at once be seen, therefore, that the liability of the agent for his sub-agent depends wholly upon the authority to appoint him, and where this authority is expressly given or expressly withheld, the application of the above principle is easy. But where nothing is said as to the appointment of sub-agent, and this question is left to inference, the matter is at once involved in doubt, and the presumptions raised by the courts as to the true intent of the parties, have been extremely conflicting.

We may then say: The liability of a forwarder arises from his contract with his principal, and depends upon what that contract is.

A. If the contract be that he is to undertake the collection of the debt and be responsible for all means used therefor, he is liable for all acts of his sub-agents or correspondents.

B. If the contract be that he is merely to transmit the claim to another for collection, he is required only to use proper care in selection of a correspondent.

C. If no definite contract is made as to the forwarder's liability, the courts raise presumptions, depending on the character of the forwarder and the circumstances of the case; and in these presumptions the courts do not agree, except in holding that in all cases the forwarder must use due care in the selection of a correspondent.

The decisions may be classified as follows:

I. Where the forwarder is a bank and the correspondent a bank, or agent other than a notary.

Suppose a merchant in New York city receives a check from a firm in Pittsburgh, and hands it over to his bank in New York for collection. The bank in New York will forward the check to its correspondent in Pittsburgh, to be presented, and, if paid, for remittance of the proceeds. Suppose, now, the Pittsburgh

correspondent negligently fails to present the check promptly, or perhaps collects the check and then becomes insolvent before remitting. Is the New York bank liable to its depositor?

1. One class of cases holds that it is. This is the law of New York, New Jersey, Ohio, Indiana, Michigan, Georgia, Montana, Minnesota, England, the supreme court of the United States and probably South Carolina.

The New York court has stated the principle in the case of *Allen v. Merchants' Bank*, 22 Wend, 215, as follows:

*Resolved*, That when a bank or broker or other money dealer receives upon a good consideration a note or bill for collection in the place where such bank, broker or dealer carries on a business, or at a distant place, the party receiving the same for collection is liable for the neglect, omission or other misconduct of the bank or agent to whom the note or bill is sent, either in the negotiation, collection or paying over the money, by which the money is lost or other injury sustained by the owner of the note or bill, unless there be some agreement to the contrary, express or implied."

This principle, therefore, is often referred to as the "New York rule."

(All the decided cases in the jurisdiction above named are then cited and discussed.)

2. It has been held in many states that the forwarding bank is not liable. This is the law in Massachusetts, Pennsylvania, Maryland, Connecticut, Missouri, Illinois, Tennessee, Iowa, Wisconsin, Kansas, Mississippi, Nebraska, Louisiana and probably North Carolina.

The rule is thus stated by the supreme court of Massachusetts in *Fabons v. Mercantile Bank*, 21 Pick., 330 (1839).

"It is well settled that when a note is deposited with a bank for collection, which is payable at another place, the whole duty of the bank so receiving the note in the first instance is seasonably to transmit the same to a suitable bank or other agent at the place of payment."

Then follows a full citation of the decisions of these states.

While the decisions supporting the Massachusetts rule outweigh those of the other class in number of states, it must be observed that they are not so well considered, and that the decision of the Massachusetts leading case of *Fabons v. Mercantile Bank*, was rested largely on a misapprehension of the United States supreme court case of *Bank v. Triplett*, in 1 Peters 25, and followed the decision of

*Allen v. Bank in New York*, that was soon afterward reversed by the court of errors. The same may be said of the Connecticut case of *East Haddam Bank v. Scovil*, 12 Conn., 303. But in addition to these cases, resting on a weak authority, it is believed that the weight of reason is on the side of the New York rule. It is useless to say that the depositor knows that it is the custom of banks to forward collections to agents at other points. He knows nothing about these agents, and no ordinary sort of inquiry can give him satisfactory information concerning them. He must trust to his own bank, that deals regularly with these distant correspondents, and has much better facilities and a greater incentive than he for investigating their reliability. It will not do to say that the consideration received by the forwarding bank is insufficient to justify a suretyship for the correspondent. The consideration is just what the banks make it, and if they are unwilling to insure the fidelity and solvency of their correspondents, they should either give distinct notice of that fact and refuse to accept collections, except for transmission, or they should demand a higher commission for collecting. Any other rule is bound to make banks careless in the selection of their correspondents; not careless enough, perhaps, to render themselves liable, but just sufficiently careless to occasion loss to their depositors.

In a matter of such great commercial importance it is highly necessary that there should be uniformity among the states. This is now effected, to some extent, by the decision of the United States supreme court, in *Exchange Bank v. Third National Bank*, 112 U. S., 276, as there can be no doubt as to what the United States courts will hold whenever the question comes before them, no matter what the decisions of the state courts may be; and in matters like this it is generally easy to invoke the jurisdiction of the United States courts, as the parties are often citizens of different states. But much may also be accomplished by the banks themselves, by adopting rules to give the depositor, by notice or otherwise, a clear understanding of the extent of the liability they propose to assume. And this would mean a virtual adoption of the New York rule by all banks, as it may be safely said that the bank announcing and maintaining the rule that it would not be liable for its correspondents would not be overburdened with business.

### TAXABLE COSTS—THE OTHER SIDE OF THE QUESTION.

Under the title "Who Should Pay Costs?" the *Harvard Law Review* for December, 1896, (10 H. L. R., 242), contains the following editorial note:

To leave each party to a lawsuit to pay his own expenses, as is practically done in Massachusetts, seems an evident selling of justice. Justice, to be sure, is like any other commodity in that it costs to produce it; but when the cost of justice is more than the man who needs it can afford to pay, or more than it is worth to him in his particular case, it is intolerable that he should be forced to go without it. In England they manage things better, on the whole, by making the unsuccessful party pay in general all the expenses of the litigation. The frequent hardships caused by the strict application of this rule, which punishes the unsuccessful party for his mistake in bringing or resisting the claim, with a severity usually in direct proportion to the doubtfulness of the matter in dispute, are well pointed out in an article in the *Law Quarterly Review* for October. The impracticability of a thorough application of the principle, and its real lack of fairness in many cases, causes it to be much relaxed in the actual practice of the English courts. But such a relaxation, except in cases where the successful party is morally at fault, is merely a return to the more primitive form of injustice. The only apparently effective way of removing the evils of present systems of imposing costs is to have the State pay them and distribute justice gratuitously. However revolutionary such a step may seem, however great the practical difficulties of the change, it may be doubted whether the new evils that would arise would be as great as those we now endure.

The people would have to pay heavier taxes, but it would be for a purpose at least as beneficial as many of those for which government funds are at present used; and as for the supposed increase of litigation that would be brought about by the cheapness of justice, there are, as the writer of the above article points out, two sides to the question. The man who brings suits knowing them

to be unfounded can be restrained in more direct ways than by the fear of costs; while he who threatens to bring unjust suits, or refuses just demands, in a frequently well founded reliance on his victim's reluctance to becoming involved in the risk and expense of a lawsuit, would have no chance under the new system.

After carefully considering the suggestions advanced both by the *Harvard Law Review* and *Law Quarterly Review*, we are confirmed in certain views expressed in this place on April 22, 1855, apropos of the opinion of Judge Bischoff in *Schildwachter v. The Mayor*, printed in this journal on that day and also reported in 12 Misc. 52. In that editorial we said in part:

"Suggestions are sometimes heard in New York to abolish the feature of taxable costs, and throw the courts open to the people without the restraining fear of affirmative penalty to an unsuccessful plaintiff or of additional expense to a defeated defendant. Such proposition appeals quite plausibly to sentiment at first blush, but we believe the thoughtful sentiment of the bar strongly favors the retention of the present system, and this not solely or principally because of selfish motives. Of course, the system is susceptible of abuse, as when two lawyers litigate for years over an insignificant claim, running up a large bill of costs by successive trials and appeals, to be paid in the end by the losing client. But, in the long run, substantial injustice does not result from the feature of taxable costs. It certainly forms a material element in discouraging groundless and vexatious litigation; and, on the other hand, litigation represents a clear pecuniary loss to a person having a valid claim that ought to be paid without suit, and taxable costs afford a means of at least partial indemnity.

\* \* \* \* \*

"A natural person who is not a non-resident may carry on suits *ad libitum*, provided he can raise money enough to pay the necessary disbursements; and, if he be financially irresponsible, he incurs no risk of loss or penalty, except the possible but very remote contingency of being rendered liable to execution against the person, through the success-

ful prosecution of a suit against him, for malicious prosecution. We are not in favor of requiring security for costs, or even granting the discretionary right to require security, in all kinds of actions brought by impecunious citizens. It is more important that poor persons with meritorious claims should not be deprived of legal remedy through inability to give security, than that all defendants should be protected against blackmail litigations. It is to be said, however, that the courts have exercised such discretion as they possess on the subject wisely and humanely. Section 3271 of the Code authorizes the requirement of security in the court's discretion in suits brought by executors and administrators. In cases of personal representatives suing to recover damages for negligence which caused the decedent's death, as the requirement of security would often effectually throttle the prosecution, the applications have been denied. (*Koch v. Keller*, 2 Law Bull., 96; *Ryan v. Potter*, 2 McCarty, 33.) as to certain kinds of actions—ejectment, for instance—we think the interests of justice would be promoted by the existence of a discretionary power to require security for costs from resident as well as non-resident plaintiffs."

The discussion of the subject certainly tends to show that no theoretically harmonious policy can be adopted for the insuring of justice in all cases. We certainly would not approve of a proposition to have the state pay out money as costs to successful parties or their attorneys. This would tend to increase the number of lawsuits, without regard to the merits and in comparative indifference as to success. Members of the bar would be tempted to co-operate in merely fostering litigation, each lawyer in the long run reaping his profit from the groundless or doubtful claims prosecuted against his own clients. What is probably meant by the suggestion to have the state pay costs is simply that the courts be thrown open to the public without liability of either party for disbursements, or on the part of the defeated party to pay anything by way of indemnity to the other side. The liability to pay costs does not operate as a deterrent from litigation on the part of impecunious persons. They have every-

thing to gain and nothing to lose by the bringing of meritorious or even speculative actions. The persons upon whom liability for costs act as a practical motive are those of moderate means, who, because they are good on execution, are apt to "go to law" to obtain justice, if the possible pecuniary penalty of defeat be a moderate one, but not if it be so large as to mean financial ruin or even substantial embarrassment. It, therefore, seems that the present policy of New York is practically the wiser one, however open it may be to criticism on the ground of abstract theory. A system of completely indemnifying the successful litigant in each particular case—paying, for instance, extraordinary fees to special or distinguished counsel which he may have retained—whether by the state or the defeated party, would be gravely objectionable. On the other hand, it would not be expedient to deprive the successful party of all indemnity. Certain arbitrary amounts fixed as costs for different stages of litigation, together with discretionary extra allowances graded according to percentage of recovery, contribute materially towards making the average successful party whole, and discouraging merely vexatious litigation, and, at the same time, such provisions do not lock courts of justice to all but the rich and the very poor.—*N. Y. Law Journal*.

## SUPREME COURT OF OHIO.

### Official Record of Proceedings.

Tuesday, January, 12, 1897.

### General Docket.

3947. *James Steel et al. v. Samuel Swartz et al.* Error to the circuit court of Wayne county. Judgment of the circuit court reversed, and that of the common pleas affirmed on the authority of *Shahan v. Swan*, 43 Ohio St., 25.

3949. *John Webb Jr. et al. v. Phillip Roettinger, Admr. et al.* Error to the circuit court of Hamilton county. Judgment affirmed.

3970. *Wood, Jenks & Company v. N. E. Chapman.* Error to the circuit court of Cuyahoga county. Judgment affirmed.

3982. *Sumner P. Bacon et al. v. Peter Kuhen et al.* Error to the circuit court of Defiance county. Judgment reversed and cause remanded.

3987. S. L. Mooney et al. v. W. V. Campbell et al. Error to the circuit court of Belmont county. Judgment affirmed.

3988. Walter Lacy et al. v. John G. Brotherton. Error to the circuit court of Hamilton county. Judgment affirmed.

4254. Samuel D. Evans v. William A. Thomas, Admr. Error to the circuit court of Portage county. Judgment affirmed, the questions argued not properly presented by the record.

4429. Lewis Meier et al. v. The First National Bank of Cardington et al. Error to the circuit court of Franklin county. Application for a rehearing of this cause, which was decided at the preceding term, is not entertained.

4440. William B. Wood, v. The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. Error to the circuit court of Marion county. Judgment affirmed for the reasons that judgment was reversed by the circuit court on the weight of the evidence. Other questions not passed upon.

4444. Daniel E. Remmsnyder v. John Galt et al. Error to the circuit court of Stark county. Judgment affirmed.

4487. Douglas Brown v. Thomas Heffner. Error to the circuit court of Miami county. Judgment affirmed.

4543. The Globe Oil Co. v. Charles H. Gardner. Error to the circuit court of Cuyahoga county. Judgment affirmed. Spear and Shanck, Jr., dissent.

5057. The State of Ohio v. J. Bohn. Error to the circuit court of Cuyahoga county. Dismissed for want of petition in error. Per Curiam report.

5205. John W. Blair v. The Pittsburg & Lake Erie Railway Co. Error to the circuit court of Mahoning county. Judgment of the circuit court reversed on the authority of Robinson v. Gary, 28 Ohio St., 241, and Railway Co. v. Whitacre, 35 Ohio St., 627, and judgment of the court of common pleas affirmed for \$6,000.00

#### Motion Docket.

2814. D. Shannahan et al. Partners etc. v. Amos B. Cole. Motion by defendant to dismiss cause No. 4499, on the general docket. Motion overruled.

2815. Franklin Alter etc. v. The City of Cincinnati et al. Motion by plaintiff for allowance of attorneys' fees in cause of No. 4871, on the general docket. Motion overruled.

2816. Ella Jane Davis v. Mary Ann Coffman et al. Motion by defendants to dismiss cause No. 5082, on the general docket. Motion overruled. Per Curiam report.

2818. State of Ohio ex rel. The International Fraternal Alliance of Baltimore City etc. v. William S. Mathews, Supt. of Ins. of the state of Ohio. Motion by plaintiff for writ of mandamus. Alternative writ allowed, return to be according to law.

2819. John Burson et al. Commissioners of Athens county v. Peter Hixson. Motion by plaintiff to advance cause No. 5315, on the general docket. Motion allowed. Briefs of defendant to be filed by January, 25, 1897.

#### New Cases

New cases filed in the Supreme Court since January 6, 1897:

5410. The Miami Valley Ry. Co. v. Clarence Devo, a minor, etc. Error to the circuit court of Miami county. M. H. & W. D. Jones, for plaintiff in error. A. T. Broomhal, for defendant.

5411. The State of Ohio ex rel. W. D. Guilbert, Auditor of State, v. W. H. Halliday, Auditor of Franklin county. Mandamus. F. S. Monnett, Attorney General, for plaintiff.

5412. Catherine M. Brigel et al. v. Joseph A. Kleiner, Admr., et al. Error to the circuit court of Hamilton county. C. W. Baker and I. J. Miller for plaintiff.

5413. The Salem Wire Nail Co. v. William I. Egts, by etc. Error to the circuit court of Hancock county. John Poe for plaintiff. M. R. Smith for defendant.

5414. The State of Ohio ex rel. W. G. Ward as Sheriff, etc. v. James C. Russell, Probate Judge. Error to the circuit court of Lawrence county. A. R. Johnson and E. E. Corn, for plaintiff. R. B. Miller, for defendant.

5415. The State of Ohio v. Richard Astor. Error to the circuit court of Carroll county. Emmet M. Adair, for plaintiff.

5416. The P. & W. Ry. Co. v. Harry Earle et al. Error to the circuit court of Summit county. Jones & Anderson, for plaintiff. Edward T. Voris, and H. E. Loomis, for defendants.

5417. The State of Ohio v. John W. Myers. Bill of exceptions to the common pleas court of Stark county. Charles C. Bow, for plaintiff.

5418. R. B. Brooks, Treas. v. H. Van Ness. Error to the superior court of Cincinnati. Rendigs, Foraker & Dennison, for plaintiff. Wilby & Wald, for defendant.

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Judge Summers, of the second circuit, handed down a decision last week in the famous case of the treasurer of Clark county against the Springfield Savings bank, affirming the common pleas decision rendered by Judge Miller, in which he absolved the bank from paying taxes on deposits. The supreme court divided equally on the case and referred it back to the circuit court. We shall publish the decision in full at an early date.

On Monday of this week the supreme court of the United States decided the portion of the South Carolina dispensary law which provides for the inspection of liquors imported into the state to be in contravention of the constitution of the United States. The law was overthrown on the theory that it discriminates against the citizens of other states in favor of those of South Carolina, and is therefore in contravention of the constitutional rights granted to the citizens of the various states to free intercourse and commerce with those of other states. Justice Brown delivered a dissenting opinion.

## NEW OHIO DECISIONS.

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### YAHN HAS YAWNED AGAIN.

A short time ago the Law Bulletin announced that its proprietor had commenced proceedings against us for infringement of its copyright on circuit court cases. He claimed that we had used syllabi of cases prepared by him.

As an illustration of the recklessness with which he made his charges against us, we refer to one case, that of *Kittredge v. Miller & Tafel*. This case was published in the Cincinnati daily *Court Index*, Aug. 3, 1896. We copied it with the syllabus, and published it.

The Bulletin copied it also and published it Aug. 10. In his petition Jahn averred that he made the syllabus, and that we copied it from the Bulletin, when in fact the syllabus was prepared by the publishers of the *Index*.

We knew also that he had been as careless in getting out his copyrights as he has been in his general business habits, and he had gained no valid franchise. What he did, fell so short of fulfilling the requirements of law that when he set it forth in his petition, it was clearly open to a demurrer. We demurred. The plaintiff then became painfully aware that he had no case, and he marched into court, withdrew his actions, and settled the costs.

We do not suppose that our readers have any interest in this controversy, and we mention it only that those who buy our books may know that they run no risk in doing so.

### A DANGEROUS PRACTICE.

We have learned that it is the practice of the judges of the courts who receive the advance sheets of the supreme court reports, to preserve them, and have them bound. This is probably done innocently but is a dangerous practice. Judges, of all persons, should have authentic copies of the reports, and these they do not get when they use the advance sheets. The advance sheets are sent out for temporary use and the supreme judges always take advantage of the opportunity that comes, between the receipt of the advance sheets and the publication of the volume, to make

such corrections as upon due consideration, are found desirable. Many of these corrections are slight, but often those of extreme importance are made. We have in mind the dropping of the word "Not," in one instance, severing the meaning of a paragraph, and in another, replacing a syllabus, so that the one on appearing upon the advance sheets, is not to be found in the completed volume. The only way that correct reports can be secured is by obtaining the bound volume. It is quite likely that there are many of these volumes now in the libraries of our judges that are supposed to be authentic, but which are erroneous in many places. It will be found much the safer way to pay \$1.50 for an authentic volume, than to pay one dollar or thereabouts, to get the often incorrect sheets bound up.

### EMPLOYER'S LIABILITY.

The supreme court of Minnesota held, in the recent case of *Carlson v. Northwestern Telephone Exchange Company*, that the decisive tests as to whether, in any given case, an employee is to be regarded as a vice-principal or a fellow-servant is not his title or his rank, but the nature of the service which he performs; that if he is authorized to perform duties which are the absolute duties of the master, he is to the extent of a discharge of those duties a vice-principal, and that whenever the nature and magnitude of the master's work, whether it be that of construction or otherwise, are such that it is necessary that orders be given regulating the conduct of his employees and directing them where to work, it is not only right but the absolute duty of the master to give such orders, and in obeying such orders the employees have a right to assume that the master, in giving the orders, has exercised due care for their safety. In the case before the court it appeared that the defendant in excavating a ditch placed the work and the men employed thereon, of whom the plaintiff was one, in charge of a foreman, who had general oversight of the work. The men were subject to his orders; he had authority to employ and discharge them and direct them what to

do and where to work, and was the supreme authority there present. The foreman negligently ordered the plaintiff from the place where he had been working into the ditch at a point where he had not previously worked, which was a place of unusual danger by reason of a crack in the earth on the side of the ditch and defects in the curbing, which danger and defects were not obvious or known to the plaintiff, who obeyed the order, and was injured by the caving in of the ditch. The court held that in giving the order the foreman was a vice-principal and the defendant liable for his negligence.—*Bradstreet's*.

#### PRICE OF A VOTE.

The supreme court of Missouri, in a decision recently rendered, declared invalid that section of the charter of Kansas City providing that each qualified voter who failed to vote at a regular election should be taxed the *exorbitant* sum of \$2.50. The court in passing upon the invalidity of this clause said that "the money value of a vote to the public *cannot* be calculated, and that such a pecuniary association debases the franchise." Can it be that our political conditions would be bettered by having such a penalty attached to each voter, who failed to exercise punctually his right of franchise? Does it not seem far more necessary and reasonable that we should qualify the right of franchise rather than to compel its exercise, a failure of which would be punished by a fine in the nature of a penalty? The right of franchise is an inalienable and a sacred right, and therefore its exercise should be wholly free from any compulsion or restraint, and left to the inclination and judgment of the elector. But the right of suffrage has been degraded and lowered by the free and unlimited license which has extended throughout our country, in which this sacred right has been placed in the

hands of nearly every person who has attained a certain age. To become eligible to this right, no account is taken of the individual's intelligence or comprehension of the nature and importance of the act which he is to perform. The right to vote should be strictly qualified and the fundamental qualification should be intelligence, and those who do not possess it should not in any event or under any circumstance be permitted to exercise the franchise of voting. The character of every successful candidate for an official position, depends not upon the number of votes he receives, but upon the character of the voters. Therefore no man, be he of native or foreign birth, should be permitted to vote unless he can speak, read and write the English language and possess a general knowledge of the primary principles of our form of government and manifest an appreciation of the duties of citizenship. If legislation to this end was enacted and enforced, the exercise of the right of suffrage would not be neglected by those vested with it, and as a natural result the character of the various officials elected to fill our offices of honor and trust would be greatly elevated.

#### A CASE OF INTEREST.

The supreme court of Iowa has just handed down a decision of great interest, and which is undoubtedly creating a great sensation in all parts of that state, and especially among the fairer sex. After a prolonged season of litigation, covering a period of five years, the highest tribunal in Iowa has decided that it is within the jurisdiction of a court to insist upon the exhibition of a woman's feet and legs on the witness stand.

The case was that of a young lady who, in crossing a street, fell into an excavation of which she had no knowledge, and sustained severe injuries about the foot and ankle, and in her petition she alleged that her injury was of such a character as to permanently disable her. And during the course of the trial the city undertook to show that the plaintiff was not permanently or seriously injured, and maintained that such fact

could be proved by an examination of the foot and ankle of plaintiff. This demand on the part of the defendant that the foot and ankle be examined and measured in the presence of the jury, which was denied by the trial judge in the lower court, and judgment was rendered for plaintiff. Defendant appealed, and one of his grounds for appealing was that the trial judge had erred in not allowing the foot and ankle to be measured in the presence of the jury in order that the character of the injury and its condition at that time might be ascertained. All the grounds upon which the defendant based his appeal were thrown out by the supreme court, with the exception of the one given above, and upon this one point that tribunal reverses the finding of the lower court, in language as follows:

"Her claim was that by reason of the fall several ligaments of the second and third toes were ruptured and her ankle severely sprained; that the injury caused severe and acute pain. Several medical men testified for the plaintiff that they had just measured her foot at various places and her leg six inches above the ankle and found it considerably larger than the other foot. At the point above the ankle they say that the leg was smaller than the other leg at the same point. An equal number of doctors who had just measured the injured foot at the same place swore for the defendant that it was the same size as the other foot except in the measurement of the leg above the ankle, which was one-sixteenth of an inch larger than the other leg at the same point. It will not admit of a doubt that this array of medical men are not all telling the truth. Either the injured foot and leg were at the points where measured of the same size as was the other foot and leg, or it was larger or smaller at some or all of the said points of measurement.

"Now, clearly, when such skilled men differ so radically touching a matter of mere measurement, as to which any number of men lacking in skill but possessed of ordinary good sense, ought to substantially agree because relating to a fact capable of exact ascertainment, it was proper to resort to the practical plan of taking these measurements in the pres-

ence of the court and jury. There is nothing indelicate in the measurement of a foot or arm or ankle in a proper case. Plaintiff offered no objections to these measurements being made. No ground of objection thereto was stated by her counsel, but the court refused to permit it to be done. As we have said, the condition of the foot and ankle was material as bearing upon the question of the permanency of the injury and the court erred in not ordering the measurements made as requested. Because of the refusal of the court to permit the measurements asked for the judgment is reversed."

Justice Robinson filed a dissenting opinion, in which he states that the decision of the lower court should have been sustained. He said in part:

"The request of the defendant was that Miss Hall remove her shoes and stockings in the presence of the jury, and we may presume before a large audience of bystanders in a crowded court room for the single purpose of having her feet and legs measured in such a manner that the jury might see it done. In my opinion it was not only within the power but it was the duty of the district court under the circumstances shown to exist to refuse to allow the desired experiment to be made. As it appears to me it would certainly have appeared indelicate if not positively indecent and would have been shocking and repulsive to any modest and sensitive woman. It was not shown to be necessary. The opinion of the majority, while disclaiming the adoption of a rule applicable to all such cases, does in effect hold that the district court had no discretion and that in all similar cases the defendant may, as a matter of right, require a woman whose injuries are in question to partially disrobe herself in the presence of the court, jury and members of the bar and possibly a court room full of bystanders and raise her garments sufficiently high to permit each of the twelve jurors to see her legs six inches above the ankles, and that this may be done even though other evidence is at command of the defendant and at hand which may show that the exhibition is wholly unnecessary, I cannot assent to such a holding."

## SUPREME COURT OF OHIO.

## Official Record of Proceedings.

Causes to and including No. 4508, on the General Docket, are called and marked submitted.

January 12, 1897.

## General Docket.

5057. State of Ohio v. J. Bohn. On exceptions to the circuit court of Cuyahoga county.

BY THE COURT.

Section 7306a, Revised Statutes (Ohio Laws, vol. 92, p. 187), contemplates the reversal by the supreme court of a judgment of the circuit court, reversing a conviction in any court inferior to the circuit court, and requires the filing of a petition in error within the time limited by the general statute.

Proceeding dismissed.

3947. Jane Steel et al. v. Samuel Swartz et al. Error to the circuit court of Wayne county. Judgment of the circuit court reversed and that of the common pleas affirmed, on the authority of *Shahan v. Swan*, 48 Ohio St., 25.

3949. John Webb, Jr., et al. v. Philip Roettinger, Adm'r, et al. Error to the circuit court of Hamilton county. Judgment affirmed.

3970. Woods, Jenks & Company v. N. E. Chapman. Error to the circuit court of Cuyahoga county. Judgment affirmed.

3982. Sumner P. Bacon et al. v. Peter Kuhn et al. Error to the circuit court of Defiance county. Judgment reversed and cause remanded.

3987. S. L. Mooney et al. v. W. V. Campbell et al. Error to the circuit court of Belmont county. Judgment affirmed.

3988. Walter Lacy et al. v. John G. Brotherton. Error to the circuit court of Hamilton county. Judgment affirmed.

4254. Samuel D. Evans v. Willia A. Thomas, Adm'r. Error to the circuit court of Portage county. Judgment affirmed, the questions argued not properly presented by the record.

4429. Lewis Meier et al. v. The First National Bank of Cardington et al. Error to the circuit court of Franklin county. Application for a rehearing of this case, which was decided at the preceding term, is not entertained.

4440. William B. Wood v. The Cleveland, Chicago & St. Louis R'y Co. Error to the circuit court of Marion county. Judgment affirmed for the reason that judgment was reversed by the circuit court on the weight of the evidence. Other questions not passed upon.

4444. Daniel E. Reemsnyder v. John Galt et al. Error to the circuit court of Stark county. Judgment affirmed.

4487. Douglas Brown v. Thomas Heffner. Error to the circuit court of Miami county. Judgment affirmed.

4543. The Globe Oil Co. v. Charles H. Gardner. Error to the circuit court of Cuyahoga

county. Judgment affirmed. Spear and Shauck, JJ., dissent.

5205. John W. Blair v. The Pittsburgh & Lake Erie Railroad Co. Error to the circuit court of Mahoning county. Judgment of the circuit court reversed on the authority of *Robinson v. Gary*, 26 Ohio St., 241, and *Railway Co. v. Whitacre*, 35 Ohio St., 627, and judgment of the court of common pleas affirmed for \$6,000.00.

3219. The German National Bank of Allegheny, Pa., v. William F. O'Gara et al. Error to the circuit court of Fairfield county. Judgment affirmed.

3798. Alfred J. Thomas v. John M. Koch, Guardian, etc. Error to the circuit court of Wayne county. Judgment affirmed.

3813. John W. Bryant et al. v. The Liverpool, London and Globe Insurance Company. Error to the superior court of Cincinnati. Judgment affirmed.

3814. John W. Bryant et al. v. The Firemen's Insurance Company. Error to the superior court of Cincinnati. Judgment affirmed.

3972. The A. V. Evans M'fg. Co. v. W. H. Jackson et al. Error to the circuit court of Sandusky county. Judgment affirmed.

3995. Michael J. Gibbons v. Richard C. Brewer. Error to the circuit court of Montgomery county. Judgment of the circuit court reversed and that of the common pleas affirmed.

4006. The Cincinnati, Jackson and Mackinaw R'y Co. v. Albert Rhoades. Error to the circuit court of Mercer county. Judgment affirmed.

4008. Oscar J. Campbell v. Thomas L. Johnson, Receiver. Error to the circuit court of Cuyahoga county. Judgment affirmed.

4033. The Mahoning Gas Fuel Co. v. Fayette Brown, Receiver. Error to the circuit court of Mahoning county. Judgment affirmed. Shauck and Spear, JJ., dissent.

4041. D. T. Ramsey v. Ulrick, Bell & Co. Error to the circuit court of Franklin county. Judgment affirmed.

4045. The Baltimore & Ohio Railroad Co. v. The City of Tiffin. Error to the circuit court of Seneca county. Judgment affirmed.

4449. The Pittsburgh & Western Railway Co. v. Margaret M. Phillips. Error to the circuit court of Geauga county. Judgment affirmed.

4467. The Wheeling & Lake Erie Railway Co. v. Samuel P. Borden et al. Error to the circuit court of Stark county. Judgment affirmed.

4468. Silas W. Goudy v. Samuel P. Borden et al. Error to the circuit court of Stark county. Judgment affirmed. Shauck and Spear, JJ., dissent.

4793. The German National Bank of Allegheny, Pa., v. William F. O'Gara et al. Error to the circuit court of Fairfield county. Judgment affirmed.

4966. Benjamin Knower, Executor, v. The City of Toledo. Error to the circuit court of Lucas county. Judgment reversed and cause remanded to the circuit court on the issues of fact.

5237. The Village of Bryan v. William W. Darby. Error to the circuit court of Williams county. Dismissed by consent of parties at costs of plaintiff in error.

5344. Joseph Pfitzer v. The C., C. & St. L. R'y Co. Error to the circuit court of Hamilton county. Dismissed by plaintiff in error, by consent of parties, at his cost.

#### Motion Docket.

2816. Ella Jane Davis v. Mary Ann Coffman et al. Motion to dismiss cause No. 5082.

#### BY THE COURT.

From the construction placed on the provisions of a will, at the suit of a widow, under the provisions of section 5963, Revised Statutes, as amended April 8, 1894 (91 Laws, 204), error may be prosecuted to this court from the judgment of the circuit court, for the reversal of the same.

Motion overruled.

2814. D. Shannahan et al., partners, etc., v. Amos B. Cole. Motion by defendant to dismiss cause No. 4499, on the general docket. Motion overruled.

2815. Franklin Alter, etc., v. The City of Cincinnati et al. Motion by plaintiff for allowance of attorney's fees in cause No. 4871, on the general docket. Motion overruled.

2818. The State of Ohio ex rel. The International Fraternal Alliance of Baltimore City, etc., v. William S. Mathews, Sup't of Insurance of the State of Ohio. Motion by plaintiff for writ of mandamus. Alternative writ allowed, return to be according to law.

2819. John Burson et al. Commissioners of Athens County v. Peter Hixon. Motion by plaintiff to advance cause No. 5315, on the general docket. Motion allowed. Briefs to be filed by January 25, 1897.

2820. John Crow et al v. John T. Kent et al. Motion by plaintiffs to reinstate cause No. 4533, on the general docket. Motion overruled.

2821. William Clerkin v. Fred W. Waltz. Motion by plaintiff for extension of time to file printed record in cause No. 5253, on the general docket. Motion overruled.

2822. William Clerkin v. Fred W. Waltz. Motion by defendant to dismiss cause No. 5253, on the general docket. Motion sustained.

2823. The Broadway & Newburg Street Railroad Company v. Joseph C. Schmitt, Admr. Motion by defendant to assign cause No. 5000 for oral argument, on the general docket. Motion overruled.

2824. The State of Ohio ex rel. Prudential Insurance Co. of America, etc., v. Charles Evans Judge. Motion by plaintiff for a mandate to the circuit court to require it to stay

proceedings in cause therein pending. Motion overruled.

2825. A. G. Hutchinson v. Willard C. Cole. Motion by plaintiff for extension of time to file printed briefs in cause No. 4618, on the general docket. Motion allowed by consent.

2826. The Castalia Sporting Club et al. v. The Castalia Trout Club Co. Motion by plaintiffs for extension of time to file printed brief in cause No. 4661, on the general docket. Motion allowed by consent.

2827. Gregg Sartor, Admr., v. B. A. Fouche, Admr. Motion by plaintiff to reinstate cause No. 4568, on the general docket. Motion overruled.

2828. S. D. Hollenbeck et al. v. The Bass Lake Co. Motion by plaintiffs to reinstate cause No. 5112, on the general docket. Motion overruled.

2829. William H. Gaylord et al. v. R. S. Hubbard, county treasurer Cuyahoga county. Motion by plaintiffs to extend injunction in cause No. 5083, on the general docket. Motion allowed by consent.

2830. The C., H. & D. R. R. Co. v. Ella Hickey, Admr. Motion by defendant to advance cause No. 5340, on the general docket. Motion allowed.

2831. The Trustees of Mahican Township, Ashland County, v. L. B. Fox et al. Motion by defendants to dismiss cause No. 4977, on the general docket. Motion allowed.

2832. Peter Scherer v. The State of Ohio. Motion by defendant to advance cause No. 4733, on the general docket. Motion allowed.

2833. The Incorporated Village of New Lexington, Ohio, v. James Hughes. Motion for leave to file a petition in error to the circuit court of Perry county. Motion allowed and cause advanced.

2834. R. C. Mott et al v. R. S. Hubbard et al. Motion by plaintiff for restraining order in cause No. 5422, on the general docket. Motion allowed, undertaking fixed at \$1,000.00 with security to be approved by the clerk of Cuyahoga county.

#### New Cases.

New cases filed in the supreme court since January 13, 1897:

5419. George V. Riggins et al., Executors et al. v. Mary E. Crath. Error to the circuit court of Pickaway county. Charles Dreback and Abernethy & Folsom, for plaintiff. C. Curtain for defendant.

5420. W. H. Hudson, Special Constable v. Joseph Denville et al. Error to the circuit court of Cuyahoga county. White & Johnson, and McCaslin & Cannon, for plaintiff.

5421. Josephine Higbee, Executrix v. Joseph Denville et al. Error to the circuit court of Cuyahoga county. White & Johnson, and McCaslin & Cannon, for plaintiff.

5422. Rowland C. Mott et al. v. R. S. Hubbard, Treasurer et al. Error to the circuit court of Cuyahoga county. Prentiss & Vorce, for plaintiffs. James W. Stewart and John G. White, for defendant.

5423. Thomas R. Kerr v. The Village of Bellefontaine, et al. Error to the circuit court of Logan county. Howenstein, Huston & Miller, for plaintiff. West & West, and William W. Ruddle, for defendants.

5424. The State of Ohio ex rel., International Fraternal Alliance, etc. v. William S. Mahews, Supt. Ins. Mandamus. Franklin T. Cahill, for plaintiff. F. S. Monnett, attorney general, for defendant.

5425. The State of Ohio ex rel., etc., Franklin Alter v. Frederick Bader et al., Commissioners et al. Error to the circuit court of Hamilton county. Theo. Horstman, for plaintiff. Rendigs, Foraker & Dinsmore, for defendant.

5426. The Standard Life and Accident Ins. Co. v. Clinton Crane et al. Error to the superior court of Cincinnati. Follett & Kelley, for plaintiff. C. W. Baker, for defendant.

5427. George Truman v. Moses A. Walton. Error to the circuit court of Greeue county. Joseph E. Haws, for plaintiff. T. E. Scroggy, for defendant.



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An attempt by an attorney to withdraw his answer and appearance in a divorce case, when made in avowed hostility to his client and as an act of retaliation for alleged nonpayment of his fees is held in *Nickells v. Nickells* (N. D.), 33 L. R. A., 515, to be outside the scope of his authority, and a judgment by default taken after such withdrawal was set aside.

In an opinion filed by director of law, Bargar, of Columbus, regarding the refunding of illegal assessments which have been voluntarily paid in full by the taxpayer, he says, that it is not sufficient for the assessment payer to have the words "paid under protest" written on the receipt, as that does not amount to a protest. The legislature has provided a remedy for the taxpayers to avoid the payment of illegal assessments and that is by applying for a restraining order under section 5848 of the Revised Statutes, and the supreme court has said that if the assessment-payer fails to apply for that restraining order and goes on and pays his taxes even if he has written across his receipt the words, "under protest" it can avail him nothing. And further, under the laws of Ohio no illegal assessment can be recovered unless an action is brought therefor within one year from the time of the payment.

Judge Wright, of the Lancaster common pleas court, rendered an important opinion last Saturday, which involved our mechanics' lien law, and the recent decision of our supreme court upon the same. The judge held that the recent decision of our supreme court declaring unconstitutional those sections of the law which permitted the sub-contractor to take a lien on a building for the construction of which he had furnished material, did not invalidate the entire law. The judge further held that the right of the original contractor to have a lien on a building which he had erected, was not effected by the recent decision of our supreme court. Had the judge held adversely, the effect of his decision would have amounted to a declaration that the state of Ohio had no mechanic's lien law.

Robert J. Ingersoll, has given up the practice of law. Hereafter he will devote his time entirely to the lecture platform. Colonel Ingersoll's law practice was said to have been an extremely profitable one, yielding him more than \$200,000 a year.

The members of the Wayne county bar last week Friday, tendered a banquet to Judge Norman M. Wolfe, of Mansfield, who had been holding court at Wooster for a few weeks, and who, during his stay made many friends in the city. The banquet was in the nature of a testimonial to him, and was a success in every way. Judge Wolfe was re-elected common pleas judge last fall.

Judge Evans, of the Franklin common pleas court, made an interesting holding this week, which involved the rights of the creditors of itinerant clothiers that come into this state to do business. The court held that under the language of the statute the rights of such creditors are placed upon an equal footing where their claims arise on transactions within the state, and that no creditor "has the bulge" over another creditor because false representations were made when a debt was created. In other words, so far as the creditors are concerned, the first one in with an execution stands the best show, and that if the legislature intended to make the law operate in any other way, they failed to express it in language which the courts can use in enforcing the law.

#### ANTI-TRUST LAW OF GEORGIA.

The most sweeping enactment against trusts ever passed in the history of modern legislation is the bill passed by the present legislature of Georgia, and which is now a law of that state, it having received the signature of the governor. Now since the bill has become a law, the next question which will present itself in direct connection with the bill will be its enforcement. The purpose of the bill, is: "To decide unlawful and void all arrangements, contracts, agreements, trusts, or combinations made

with a view to lessen, or which may tend to lessen, free competition in the importation or sale of articles imported into this state; or in the manufacture or sale of articles of domestic growth, or of domestic raw material; to declare unlawful and void all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed or which tend to advance, reduce or control the price of such product or article to producer or consumer of any such product or article; to provide for forfeiture of the charter and franchise of any corporation organized under the laws of this state, violating any of the provisions of this act; to prohibit every foreign corporation violating any of the provisions of this act from doing business in this state; to require the attorney general of this state to institute legal proceedings against any such corporations violating the provisions of this act, and to enforce the penalties prescribed; to prescribe penalties for any violations of this act; to authorize any person or corporations damaged by such trust, agreement, or combination to sue for the recovery of such damages, and for other purposes."

#### CASES DECIDED IN THE SUPREME COURT.

The supreme court handed down several important decisions this week, among those being the case involving the constitutionality of the collateral inheritance tax law, passed April 20, 1894, and which provides for the levying of a tax of five per cent. on all collateral inheritances above \$200. By the provisions of this law seventy-five per cent. of the amount collected is to go into the state treasury, and twenty-five per cent. is to go into the treasury of the county where the estate is located. The case was brought to the supreme court in error from the circuit court of Franklin county, which upheld the constitutionality of the law and which holding was sustained by the supreme court. The case applies with equal force to all counties in the state.

Another case of importance, styled *The State of Ohio v. Joseph Hutchinson* which involved the pure food laws, wa

decided by the supreme court. Hutchinson, who was a saloonkeeper, was arrested by the officers of the pure food department for selling beer containing salicylic acid. In the justice court he was found guilty and fined. This judgment was reversed in the common pleas court on the ground that the state was obliged to show some particular instance where beer had been sold containing acid in sufficient quantity to be injurious. The decision handed down by the supreme court sustains that rendered by the justice, and declares it against the pure food laws to introduce the use of salicylic or benzoic acid in the manufacture of any article of food or drink, and holds it to be contrary to the pure food laws to introduce any substance into any article of food or drink, the continuous use of which will prove injurious.

A rather unusual insurance case involving lightning and gunpowder was decided by the supreme court. The insured, Henry Roast, insured his house against lightning, but lightning did not strike his house, but did strike a powder mill near by, the explosion of which set fire to his house and destroyed it. The common pleas court decided against his right to recover his insurance money. The case was taken to the circuit court which gave judgment against the insurance company, when finally the case reached the supreme court which sustained the holding of the court of common pleas, preventing a recovery by the insured on his policy of insurance.

#### DISPOSING OF DEMURRERS.

When Judge E. W. McKinstry was on the bench in California it was in the old days, and the judge had to go from town to town on horseback, with not too much time to stay at each place for the transaction of his business. Very often, too, his time would be taken up with frivolous issues or unimportant cases, all of which caused him irritation and annoyance.

One day the judge found a novel way to put a stop to this. He arrived at a small town after riding all night, and dashed up to the courthouse in top boots and covered with dust. He had been

delayed, and had no time to spare. Up the stairs he stalked into the courtroom and on to the bench, and proceeded to look over the calendar.

At that time the calendar was full of unlawful detainer suits, and squatters' cases, entailing a host of demurrers; and when Judge McKinstry looked over the calendar, he found nothing else to occupy the time of the court save these tiresome demurrers. The day was warm, and the judge was tired. He looked up and said: "I see nothing but a lot of demurrers here. These I have already observed to be entirely groundless, and I don't propose that they shall waste the valuable time of this court. So I give notice to all the attorneys present that, while I am ready to hear arguments upon each and every demurrer here, I shall impose a fine of \$5 upon every attorney whose demurrer is overruled. I give the attorneys present five minutes to deliberate whether they shall withdraw or present their demurrers. I shall then proceed to business."

The judge took out his watch and waited. One minute passed, two, three; and then one attorney arose as if ashamed of himself, and said: "If your honor please, upon mature consideration, I desire to withdraw the demurrer in this case."

The example once set, attorney after attorney arose and made the same statement, until by the time the five minutes were up every single demurrer had been withdrawn, and the court stood with a clean calendar. Then Judge McKinstry rose, clattered out of his court-room into the street, mounted and rode away to the next town on his circuit.—*Chicago Law Journal*.

#### UNFAIR TAXATION.

The unfairness of taxation gives a little basis for the belief that our government is run by the rich for their own advantage as against the poor. This incendiary belief, which is propagated chiefly by demagogues and among the ignorant, began to spread like contagion when the Federal Income Tax was defeated. It is the staple of many wild harangues full of lurid rhetoric and

empty of facts. But there is danger of shutting our eyes to the kernel of truth in this belief because the demagogues and fanatics, in their desire to make a powerful impression, exaggerate the evils which exist, imagine others where none exist, blacken the fame of our nation by falsifying its conditions, conjure up the myth of a devilish plutocratic oligarchy as the secret power of government, assail pulpit and press as subsidized, charge bribery or cowardice on all who reject their own pernicious leadership, and with a distorted view of the facts malignantly attack as robbers all who have accumulated wealth, even when in so doing they have added to the prosperity of their community and the wealth of the nation. But partisanship, passion, intemperance, and falsehoods must not be allowed to kindle antagonistic passion or prevent us from seeing real grievances. One such is found in unfair taxation.

It is a truth that should shame every citizen, that the poor people pay much more than their fair share of the taxes. Without entering now upon disputed theories of the true mode or just basis of taxation, we can see the plain fact that, at least in many parts of the country, the percentage of the true value of their property which is paid by the poor is greater than that paid by the rich. It must be conceded that there are difficulties in getting at the true assessment of property. If assessors take the sum which the property would bring at forced sale they may quite easily name an amount for a small cottage of which possible purchasers are many, but it is not so easy to name an amount for a great block worth millions of dollars which no one who had the ability might be willing to buy at its real value. But with all reasonable allowance for such difficulties, it is still true and generally acknowledged that the average assessment of cottages or other small premises is higher in proportion to value than the assessment of great business blocks. One reason is that the owner of a small piece of property cannot afford to contest the assessment. The possible saving, if successful in his contest, would not pay the expense. But with great assessments, the possible reduction, even for a single year, may be worth fighting for; and besides

that, the wealthy owner, unlike a poor man, can afford to pay out more than he can save in one year and wait for his recompense in the savings of years to come. For these reasons and others, among them the greater personal influence of wealthy men with assessors, it is a well-known fact that the homes of the poor pay more than a just share of the taxes.

Another and worse injustice is in the farcical taxation of personal property. All the poor man's property is usually in a little home. The rich man's wealth is often altogether, or chiefly, in personal estate. The poor man's home never escapes taxation; the rich man's personalty usually escapes in whole or in a large part. The total assessments of personal property in the city of Rochester, New York, are less than \$6,000,000, while the real property is assessed at more than \$100,000,000. Yet the personal property actually owned in that city if it does not even exceed the real property in value, certainly does not fall far below it. This is only a sample of assessments elsewhere.

The unfairness is not in the laws but in their enforcement. Whatever changes we may have in our tax laws, the result will not be greatly better until they are fairly enforced. It would be harsh to say that we are a nation of tax shirks; but the percentage of tax shirks in our population is disgracefully large, and there is little public sentiment against tax evasion. Any organized conspiracy of the rich to favor their own class in this respect exists only in the imagination of gangrened brains. But through their individual selfishness, meanness, and dishonesty many rich people elude the burden of taxation, leaving it to fall more heavily on the weak shoulders of the poor. The fact does not condemn our system of government; it does not justify incendiary utterances; but it does call for a remedy. A quickened, intensified, and just public sentiment against the unmanliness and baseness of an attempt by the strong to cast their burdens on the weak is greatly needed. It would stimulate tax officers to respect their oath and do their duty, which they are afraid to do now. It might awaken some manliness in those of the rich who now

sneak out of their just obligations, binding them upon the poor. Even if their honor could not be aroused, they might feel the sting of contempt. Certainly they would not dare to defraud justice and wrong the poor in the face of a fully aroused public. They know that the wrath of outraged justice may become injustice. In Switzerland the rich men themselves voluntarily favored the poor by reforming their law so that the larger an estate or income may be the higher shall be the rate or percentage of taxation. That law is not a dead letter or a farce in its execution. The rich Swiss pay their higher taxes without complaint. From them our tax shirks should learn a lesson, if not of patriotism, at least of prudence.—*Case and Comment.*

### SUPREME COURT OF OHIO.

#### Official Record of Proceedings.

COLUMBUS, January 26.

#### General Docket.

3834. R. Brinkerhoff, trustee, et al. v. Fred K. Tracy, Admr. Error to the circuit court of Richland county.

MINSHALL, J.

Where one, in embarrassed circumstances, makes and delivers a chattel mortgage to a third person, in trust for certain of his creditors, with the requirement that he shall sell the property at retail and apply the proceeds to the claims of the preferred creditors until paid in full; and afterwards, with the consent of his other creditors, to continue to sell and apply the proceeds to their claims *pro rata*; and the property so mortgaged is largely in excess of the amount of the claims of the preferred creditors, the legal effect of such mortgage is to hinder and delay his other creditors within the meaning of section 6344 Revised Statutes, and no action for damages can be maintained by the mortgagor against the trustee for a failure to execute the trust.

Judgment of the circuit court reversed and that of the common pleas affirmed.

3992 Hiram Bricker v. David B. Elliott, Admr., etc. Error to the circuit court of Knox county.

SHAUCK, J.

A suit to compel a trustee to account to the beneficiaries of his trust, and for a judgment for the amount which upon such accounting may be found in his hands, is not an action for the recovery of money only; and from the

judgment of the court of common pleas in such action either party may appeal to the circuit court.

Judgment reversed.

3694. The Baltimore & Ohio Railroad Company v. William Lersch. Error to the Circuit Court of Richland county.

BRADBURY, J.

When a railroad company has laid upon and along a street of a city, a railroad track and is running trains thereon, and the owner of abutting improved property, in an action brought under Sec. 3283, Revised Statutes, to recover damages on account thereof, specifically alleges that the injuries of which he complains, were caused by noises, smoke, dust and sparks of fire, resulting from passing locomotives and cars, but does not set up any easement, fee or other interest in the street, or aver any injury thereto, he should not be permitted on the trial of the action, over the objection of the railroad company, to establish as the measure of his recovery, the difference between the value of the property before and after the track was laid.

2. Where, in such case the trial court, over the objection of the railroad company, permits the plaintiff to offer evidence of damages that did not result from the causes so specifically alleged, or, if the court, over the objection of the railroad company, should instruct the jury to consider, in estimating damages, any impairment of the easement to his property; each of such rulings will constitute prejudicial error for which a judgment for the plaintiff will be reversed.

3. The provision of Sec. 3283, Revised Statutes, by which an action brought under that section is required to be commenced within two years after the completion of the track, is a statute of limitation and a delay beyond that period does not extinguish the right of recovery. If the railroad company does not, either by demurrer or answer, interpose an objection on account of the lapse of time, but proceeds to trial on the merits, it will be deemed to have waived the benefit of the provision.

Judgment reversed.

3968. The Germania Fire Ins. Co. v. Henry Roost. Error to the circuit court of Richland county.

SPEAR, J.

1. The meaning of a contract is to be gathered from a consideration of all its parts, and no provision is to be wholly disregarded as inconsistent with other provisions unless no other reasonable construction is possible.

2. A special provision will be held to override a general provision only where the two cannot stand together. If reasonable effect can be given to both, each is to be retained.

3. A fire insurance policy on a house and contents contained in the printed portion, a provision that "this insurance does not apply to or cover any loss by explosion, unless fire, ensues, and then the loss or damage by fire only," and had attached thereto a special

clause providing "that this policy insures against any loss or damage caused by lightning to the interest of the assured in the property described, not exceeding the sum insured, and subject in all other respects to the terms and conditions of the policy." There was stored in a certain powder house situate across the street from the building insured and seventy-one feet distant therefrom, over which house neither party had any control, two tons of powder. The powder house was struck by lightning causing an explosion of the powder, by force of which explosion the insured house and contents were totally destroyed.

*Held:* That, within the meaning of the clause recited, the loss was occasioned by explosion which was not included in the risk, and that the company is not liable.

Judgment reversed, and judgment for plaintiff in error.

3886. *The Lake Shore & Michigan Southern Railway Company v. Sarah B. Orndorff.* Error to the circuit court of Fulton county.

BURKET, J.

1. When a person having in charge a child of sufficient age to require payment of fare, takes passage on a railroad, such person becomes liable for the payment of the child's fare, and upon refusal to pay, both may be ejected from the train at the next station.

2. When such person has paid fare, or purchased a ticket which is taken up by the conductor, such conductor must, before ejecting such person and child, return or offer to return to such person, the unused value of such ticket or fare over and above the fares of both for the distance already traveled.

3. If the ticket is such that a stop-over may be had thereon, the conductor may tender a stop-over check instead of money, but to retain the ticket and expel the parties from the train, renders the company liable in damages. Judgment affirmed.

3887. *Emma V. Ewan v. The Brooks-Waterfield Company.* Error to the superior court of Cincinnati.

WILLIAMS, C. J.

1. The indorsement of the maker's name on the back of a promissory note payable to his order, and its delivery in that form to another for value, are essential parts of the execution of the note, which then becomes in legal effect, payable to the holder or bearer; but the maker does not thereby become an indorser in the legal sense of the term, nor contract any liability but that of a maker.

2. The undertaking of a third person who places his name in blank on the back of such a note before or at the time it is so delivered by the maker, rests upon the consideration which supports the note in the hands of the holder, and *prima facie*, is that of a surety of the maker for the payment of the note; and he will be held accordingly, unless he can show a different understanding or agreement between the parties, which, it is competent for him to do.

Judgment reversed.

5302. *The State of Ohio v. Joseph C. Hutchinson.* Bill of exceptions by the Prosecuting Attorney to the rulings of the Court of Common Pleas of Franklin County.

By the Court:

1. The proviso contained in Sec. 3, of the pure food laws of the state as amended April 22, 1890, (37 Laws, 248), applies to the whole act, and is not descriptive of any particular offense therein defined; and, for such reason, a negative averment of the facts within the proviso, is not required in an affidavit charging an offense against the act; but the facts may be offered in evidence as a defense under the plea of not guilty.

2. A charge to a jury that would preclude it from considering evidence tending to show that the defendant in making a particular sale, complied with the requirements of the proviso, is erroneous.

3. A sale of beer as a food, containing salicylic acid in any quantity, without a label on the package, notifying the purchaser that it contains such an ingredient, is, when found to be poisonous or deleterious to health by its continuous or indiscriminate use, an offense against the pure food laws of the state, under the definition of an adulteration contained in clause 7, paragraph "b," Sec. 3, of the act as amended April 22, 1890.

Exceptions overruled.

5317. *Lorenzo D. Haggerty, Probate Judge of Franklin county v. the State ex rel Joseph H. Dyer, prosecuting attorney.* Error to the circuit court of Franklin county.

By THE COURT:

1. The act of April 20, 1894. (O. L. 91. p. 160.) amending "an act imposing a collateral inheritance tax" is not repugnant to any provision of the constitution because of its discriminations among collateral kindred.

2. The property "which shall pass by sale" within the meaning of the act is such only as passes in transactions which are in fact gifts through in form sales, and the act does not restrict the guaranteed right to dispose of property by sale for full consideration.

3. Said act being within the grant of legislative power, and not within any limitation thereon is valid.

Judgment affirmed.

3858. *John Farley executor v. Alma Leisly, Executrix.* Error to circuit court of Cuyahoga county.

By THE COURT:

1. In an action by one executor or administrator against another, the parties are adverse within the purview of Sec. 5242, of the Revised Statutes, and neither is competent to testify against the other to any matter not within one of the exceptions contained in that section.

2. When such party is called to give testimony not permitted by either of the exceptions, an objection by the adverse party to the proposed testimony on the ground that it is incompetent is sufficient, it is not necessary to object to the witness as incompetent.

Judgment affirmed.

4051. Walter V. Ong et al v. Charles Worden. Error to the circuit court of Cuyahoga county. Judgment affirmed.

4052. John W. Culvert v. Lizzie M. Russell et al. Error to the circuit court of Morgan county. Judgment affirmed.

4070. Elihu J. Farmer v. William T. Cope et al., Ex'rs. et al. Error to the circuit court of Cuyahoga county. Judgment affirmed.

4083. D. S. King v. Hester C. Spayne. Error to the circuit court of Clinton county. Judgment of the circuit court reversed and that of the common pleas affirmed.

5027. Samuel N. Anderson v. George G. Hoover, Treas. Error to the circuit court of Licking county. Judgment affirmed. Per Curiam report, with No. 5317.

#### Motion Docket.

2817. The Rock Plaster Manufacturing Company et al. vs. Gustavus A. Scheyer. Motion by defendant for leave to file an answer in error in cause No. 4950 on the general docket. Motion allowed and answer filed. Questions arising to be heard on submission of cause.

2835. John Neaster et al. vs. Ellen Gilday et al. Motion by plaintiffs to reinstate cause No. 4936 on the general docket. Motion overruled.

2836. The State of Ohio ex rel. Edwin Phifer vs. Elmer V. Bolton. Motion by plaintiff for leave to file a petition for issuance of a writ of quo warranto. Motion allowed. Petition filed. Cause advanced and hearing fixed for January 27, 1897.

2837. The C. H. & D. Railroad Company vs. Ada Crumley, administratrix. Motion by defendant to advance cause No. 5381 on the general docket. Motion allowed.

2838. Walter L. Warien by etc. v. the Columbus Street Railway Company. Motion by plaintiff to dispense with printing parts of record and to advance cause No. 5403 on the general docket. Motion allowed.

2839. William Franzer vs. Bernard Smith. Motion by plaintiff to print additional record in cause No. 5305 on the general docket. Motion allowed.

2840. James Reed et al. vs. the State of Ohio ex rel. Thomas J. McDermott. Motion by plaintiff to dispense with printing briefs and to advance cause No. 5336 on the general docket. Motion to advance allowed. Motion to dispense with printing briefs overruled. Briefs of plaintiff to be filed February 1, and those of defendant by February 15, 1897.

2841. Katherine Guentzler vs. Emma K. Weinhardt, administratrix. Motion by plaintiff for extension of time to file printed briefs in cause No. 4675 on the general docket. Motion allowed by consent.

2842. George V. Riggin et al., executors, vs. Mary E. Creath. Motion by plaintiff for stay of execution in cause No. 5419 on the general docket. Motion overruled.

2844. I. B. Poyer, guardian, etc., vs. Jacob Horing et al., executors. Motion by plaintiff for extension of time to file printed record in cause No. 5335 on the general docket. Motion allowed, and time extended to March 25, 1897.

2845. Allen C. Ady vs. the State of Ohio. Motion for leave to file a petition in error to the circuit court of Franklin county. Motion overruled.

#### New Cases.

New cases filed in the supreme court since January 20, 1897.

5428. The State of Ohio ex rel. Edwin Phifer v. Elmer C. Bolton. *Quo warranto*. W. H. Kinder and W. H. Anderson, for plaintiff.

5429. The Directors of The Wesleyan Cemetery of Cincinnati v. The First Methodist Episcopal Church of Cumminsville. Error to the circuit court of Hamilton county. W. G. Roberts and R. C. Taylor, for Plaintiff. Berry & Cahr, for defendant.

5430. Bell Brothers & Co. v. Philip Roettinger et al. Trustees et al. Error to the circuit court of Hancock county. George H. Phelps, for plaintiffs. H. F. Burket, A. Blackford and J. A. Bope, for defendants.

5431. The Incorporated Village of New Lexington, Ohio, v. James Hughes. Error to the circuit court of Perry county. J. E. Powell, for plaintiff. Donsheu, Spencer & Donsheu, for defendant.



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The Clark County Bar Association elected the following officers for the ensuing year at a meeting held last Monday evening: President, John L. Zimmerman; vice president, John L. Plummer; secretary, Earl Stewart; treasurer, W. W. Witmeyer; trustees, Judge A. N. Summers, J. K. Mower, J. Frank McGrew, Edwin L. Arthur, W. W. Kiefer and Hon. T. J. Pringle.

As a feature of this week's NEWS, we present to our many readers the familiar faces of our new judges, who will assume their judicial duties next week, some for their first time, the others having been re-elected at our last general election. It was our intention to have this week's issue contain a complete list of the new judges, but owing to the delay in receiving some of the pictures, and the large number required, we are unable to give them all. In our issue next week we will conclude the list. There will be as many more as we have given this week.

On Monday this week the supreme court of the United States, by a bare majority, affirmed the validity of the Ohio law regulating the taxing of express companies, and known as the Nichols law.

Chief Justice Fuller announced the decision, which affirmed the decisions of the lower courts, the costs being assessed upon the companies. Justice White, Field, Harlan and Brown dissenting.

The court also sustained the Indiana law taxing telegraph companies which was brought up for review by appeal from the judgment of the Indiana state supreme court. From this decision Justice Harlan and White dissented. One reason for their dissent was stated by Justice Harlan. The law of Indiana taxing railroad companies provides a penalty of sixteen per cent. for delinquency; and in the case of telegraph companies the penalty for delinquency is increased to fifty per cent., this Justice Harlan, said, was a denial of equal protection of the law guaranteed by the federal constitution.



HON. MARSHALL J. WILLIAMS, WASHINGTON C. H., O.  
Judge of Ohio Supreme Court.

Marshall J. Williams was born on a farm in Fayette county, Ohio, February 22, 1837. His early education was obtained in the common schools of Washington C. H., supplemented by a two years' course in the Ohio Wesleyan University at Delaware, Ohio. In 1855 he began the study of law at Washington C. H., in the office of the Hon. Nelson Rush. He was admitted to the bar of Ohio in November, 1857, and immediately began the active practice of his profession at Washington C. H. In 1859 he was elected prosecuting attorney of Fayette county, and served for two terms. In 1869 he was elected to represent his county in the fifty-eighth general assembly, and was reelected in 1871. Upon the close of his legislative term of office he



HON. GEORGE R. HAYNES, TOLEDO, O.  
Circuit Judge.

George R. Haynes was born at Monson, Mass., in the first half of the present century. When a youth the family settled on a farm in Huron county, Ohio, near Norwalk. His education was obtained in the district schools and at Norwalk Academy. A portion of his time each year was spent in teaching, and the balance in studying. He commenced the study of law at Norwalk, with John Whitbeck. After about a year and one-half he went to Fremont, and finished with Hon. L. B. Otis. He lived at Fremont nearly four years, and then moved to Toledo, where he has since resided. He served one year as prosecuting attorney of Sandusky county, by appointment. He was city solicitor of Toledo for four years, and prosecuting attorney of Lucas county for the same length of time. He was elected common pleas judge, and then, in 1884, was elected circuit judge, and reelected in 1890 and 1896.

resumed the practice of his profession at Washington C. H. and continued therein until 1884, when he was elected judge of the circuit court for the second circuit. He was chosen as the first chief justice of the circuit court of the state. At the republican state convention, held at Columbus in 1886, he was nominated for the office of judge of the supreme court. He was elected and took his seat upon the bench of that court on the 9th of February, 1887. He was reelected in 1891, and renominated at the convention held in Columbus, Ohio, March, 1896, by acclamation, for another term, which will begin February 9, 1897. He is the present chief justice of the supreme court (1896).



HON. PETER F. SWING, BATAVIA, O.  
Circuit Judge.

Peter F. Swing, born March 25, 1845, in Clermont county, Ohio, is a son of

Judge Philip B. Swing, U. S. judge S. D. O., and a grandson of Judge Owen T. Fishback of said county. He was a member of the 9th O. V. C. during the war of the rebellion, and when mustered out August, 2, 1865, was a captain in said regiment. At the close of the war he entered Ohio Wesleyan University, from which he graduated in June, 1869. He commenced the practice of law in partnership with his father at Batavia, Ohio, in the year 1870—was elected circuit judge in 1884 for the 1st judicial circuit and was reelected in the years 1890 and 1896.

profession he was appointed by the city council, mayor of the city of Mansfield, and served for a period of six months. He was twice elected city solicitor for the city of Mansfield and served with distinguished ability. At the time of his election as circuit judge he was senior member of the firm of Douglass & Douglass. He is a Democrat of the Jacksonian school. Personally he is dignified, courteous, and a thorough gentleman. He has a beautiful home and interesting family. Judge Douglass received a magnificent testimonial of confidence and respect at the polls. His vote in the circuit was 8,011 over his competitor.



HON. SILAS M. DOUGLASS, MANSFIELD, O.

Circuit Judge.

Silas Marion Douglass, who was, in November, elected for the full term of six years in the 5th judicial circuit court of Ohio, was born on a farm in Richland county, Jan. 1, 1853, where he remained until he reached his majority. After teaching school for several years he entered Wittenburg College and was finally graduated from Heidelberg. He read law in Mansfield, Ohio, with Judge M. May as his preceptor, and then entered the senior class of the Cincinnati law school and was graduated from that institution in June, 1883. He began the practice of law at once in the city of Mansfield. Soon after his advent into his chosen



HON. HARRISON WILSON, SIDNEY, O.

Circuit Judge.

Harrison Wilson was born near Cadiz, in Harrison county, on the 15th day of March, 1841. He was educated at the Albany Manual Labor School, in Athens county, and at the Ohio University, Athens, Ohio. At the beginning of the war he enlisted in company "I" of the 25th Ohio Infantry, and served with the army in West Virginia in the ranks of this company until the 7th of December, 1861, when he received a commission as 2d lieutenant, and was transferred to the 20th Ohio Infantry, as reorganized for three years' service. He served in this regiment until the close of the war,

and was promoted successively to 1st lieutenant, captain, major, lieutenant colonel, and colonel of the regiment. He was also acting adjutant of the regiment for nine months of his service. He was in all the engagements under Grant, from Ft. Donelson to Vicksburg, and under Sherman from Chattanooga to Atlanta, on the march to the sea, and through the Carolinas to the grand review at Washington. At the close of the war he settled in Sidney, Ohio, and read law with the late Ex-Attorney General James Murray, with whom he formed a partnership when admitted to the bar, which lasted until General Murray's death in 1879. Since then Colonel Wilson continued in the practice of his profession at Sidney until he went upon the bench in November, 1895, at which time he was elected to fill the unexpired term of Judge Shauck, who had been promoted to the supreme court. Judge Wilson was reelected as judge of the second circuit for a full term at the last November election and will enter upon his term on the 9th of February.



HON. DUNCAN DOW, BELLEFONTAINE, O.  
Common Pleas Judge.

Duncan Dow was born near Bellefontaine, O. He graduated from the Cincinnati Law School in the year 1868 and entered immediately into the practice of law at Bellefontaine, with D. McLaughlin under the firm name of McLaughlin & Dow, and has continued in the active practice ever since. In 1869 he was elected prosecuting attorney of Logan county, which office he held for two terms. He was elected representative in the Ohio General Assembly in 1875, serving throughout the 62d and 63d General Assemblies.

Judge Dow was elected senator in the 13th district in 1886, was a member of the judiciary and other important committees. He drafted and secured the passage of the well-known "Dow Liquor Law," one that has stood the test of all legal opposition. He also drew and secured the passage of the law requiring train bulletins to be posted in all depots.

He was elected common pleas judge of the 3d subdivision of the 10th judicial district by a majority of 2,889.



HON. WM. B. CREW, M'CONNELLSVILLE, O.  
Common Pleas Judge.

William B. Crew was born in Morgan county, Ohio, in April, 1852. He was educated at Westtown College near Phil-

adelphia, Penn.; studied law with Hon. M. M. Grauger, of Zanesville, Ohio, and was admitted to the bar in 1873. He commenced the practice of his profession in McConnelsville, Ohio, in June, 1875. In 1876 he was elected prosecuting attorney of Morgan county, which office he held one term. In 1889 he was elected representative from Morgan county, and in 1891, while yet a member of the legislature, was nominated and elected judge of the common pleas court for the first subdivision of the eighth judicial district. He was renominated without opposition, and has just been reelected.



HON. EMMET M. WICKHAM, DELAWARE, O.  
Common Pleas Judge.

Emmet M. Wickham was born in Delaware county, Ohio, October 29, 1859; received a common school education, and commenced the occupation of school teaching in the spring of 1880, which occupation he followed for twelve years in Delaware county. He commenced the study of law in connection with school teaching in the fall of 1889, under the tutorship of the Hon. F. M. Marriott, of Delaware, and was admitted to the

bar in December of 1891. He commenced the practice of law in Delaware, Ohio, in September, 1892, and was associated with his former tutor, Mr. Marriott, and assisted him in his practice until January 1, 1895, when a partnership was formed. He was elected to the common pleas bench last November.



HON. DAVID T. NYE, ELYRIA, O.  
Common Pleas Judge.

David T. Nye, judge of the court of common pleas of the district embracing Lorain, Medina and Summit counties, Ohio, was born at Ellicoth, Chautauqua county, New York, December 8, 1843.

Judge Nye was reared upon a farm in Otto, Cattaraugus county, New York, and in 1861, when seventeen years of age, enlisted in the first military company from his town. Owing to the objection of his parents the officer refused to muster him into the army. His patriotic services being refused, he devoted his energies to obtaining an education.

In the spring of 1862 he entered the academy at Randolph, New York.

He taught school near Randolph, and in 1864 he came to Ohio, and continued as a teacher until the spring of 1866, when he entered the preparatory department of Oberlin College.

By teaching winters he was able to enter the college in '67, graduating with his class in 1870.

While superintendent of public schools in Milan, Erie county, Ohio, he began the study of law and was admitted to the bar in Elyria, Ohio, in August, 1872.

From the time he entered Randolph Academy, Judge Nye's resources were dependent upon himself.

After practicing law a short time in Emporia, Kansas, he returned to Elyria, entering the office of Hon. John C. Hale where he pursued his studies a year, after which he opened an office and built up a fine and remunerative practice.

As school examiner, councilman, member of the board of education and other local offices, he has proved himself a valuable and respected citizen.

In 1861 he was elected prosecuting attorney of Lorain county.

In 1891 he was elected as judge of the common pleas, and reelected in 1896 by a large majority, his services on the bench having shown rare ability.



HON. WILLIAM CHAMBERS, CALDWELL, O.  
Common Pleas Judge.

William Chambers was born in Calvert county, Maryland, March 11, 1842, and came to Ohio in November, 1853, locating in Monroe county, where he resided and worked on a farm till 1859, when he went to Rush county, Ind., where he re-

mained till the spring of 1860. He then returned to Maryland, where he resided until the spring of 1863, when he again returned to Monroe county. Here he taught school and read law and was admitted to the bar in September, 1869. He located for the practice in Caldwell, Ohio, in the spring of 1871. He served as mayor of Caldwell, and prosecuting attorney of Noble county. At the April election, 1892, was elected as an additional judge of the common pleas for the first subdivision of the eighth district, composed of the counties of Guernsey, Morgan, Muskingum and Noble, taking office April 18, 1892. He was reelected at the November election, 1896, his new term beginning April 18, 1897.



HON. LINN W. HULL, SANDUSKY, OHIO  
Common Pleas Judge.

Linn W. Hull was born April 9, 1856, on a farm in Perkins township, Erie county, Ohio. He was educated at Oberlin College, Ohio, and Union College and Cornell University, New York. He graduated from the Cincinnati Law school in May, 1883, and at once entered upon the practice of law at Sandusky. He practiced alone until the year 1886 when he formed a partnership with Homer Goodwin and Lewis H. Goodwin under the firm name of "Goodwin, Goodwin & Hull." His connection with this firm continued for six years.

Soon after its dissolution he became a member of the firm of "King & Hull," of which Judge E. B. King, of the circuit court, was the senior member. This partnership was dissolved upon the election of Judge King to the Circuit bench. At the time of his election as common pleas judge last November, Mr. Hull was the senior member of the firm of "Hull & Guerin," which was composed of himself and W. E. Guerin, jr.

Mr. Hull's practice has been of a general character and in all branches of the profession. Since his admission to the bar in 1883 he has been active in politics and taken part and spoken in every campaign since that time. He was six times chairman of the Republican Executive Committee of Erie county and resigned that position upon his nomination for common pleas judge. He was a delegate from the thirteenth congressional district to the Republican National Convention of St. Louis in June, 1896, which nominated McKinley for president, and has often been delegate to district and state conventions.

Prior to his election as common pleas judge he had never held a public office except member of the board of education of Sandusky.



HON. JOHN T. MAXWELL, MILLERSBURG, O.

Common Pleas Judge.

John T. Maxwell was born in Holmes

county, Ohio, May 27, 1835, and was raised on a farm. He read law in the office of Hon. Daniel S. Uhl, and was admitted to the bar in the supreme court of Ohio in 1860. He was in the military service for a time in 1862-3, in the army of the Cumberland, participating in the battle of Murfreesboro, on Stone river, Tenn. He served as prosecuting attorney of his county from 1864 to 1868, and served in the minor positions of school examiner, mayor of his town, and as a member of the board of deputy state supervisors of elections for five years; and at the November election, 1896, was elected judge of the common pleas court of the 3d subdivision of the 6th judicial district of Ohio, composed of the counties of Wayne, Holmes and Coshoc-ton. His church affiliation is United Presbyterian.



HON. JOHN C. MILNER, PORTSMOUTH, O.

Common Pleas Judge.

John C. Milner was born near Norristown, Belmont county, Ohio. He was educated at the district school and Normal University at Lebanon, Ohio, from which institution he graduated in 1875. After spending a few years in teaching

he entered the law school in Ann Arbor in 1878. He attended Shoemaker's School of Oratory in Philadelphia in 1883, and in December of the same year was admitted to the bar in Topeka, Kas. He returned to Ohio and was admitted to the bar of this state in June, 1884. He thereupon located at Portsmouth, where he formed a partnership with Hon. J. J. Harper and Judge F. C. Searl. In 1890 he was elected prosecuting attorney of Scioto county and reelected without opposition in 1893. He was elected as common pleas judge at the last November election.

continued ever since. Judge Jones held the office of member of the board of education from 1873 to 1881. His family consists of five children, three sons and two daughters.

Mr. Jones was a member of the Ohio senate in the Sixty-fifth General Assembly, and in 1890 was elected as prosecuting attorney of Licking county, and re-elected in 1893; his term expired in January, 1897. At the November election he was elected judge of the court of common pleas, his term of office commencing February 9, 1897.



HON. JOHN DAVID JONES, NEWARK, O.  
Common Pleas Judge.

John David Jones, judge-elect of the court of common pleas, was born March 2, 1845, at Granville, Licking county, O. His parents were both natives of Wales. Mr. Jones attended the schools in the country near Granville, and Denison University, until 1863, when he volunteered in the war of the rebellion, and served until the end of the war in the O. V. H. A. After the war he pursued his studies at the university for one year, and then, in 1867, commenced the study of law in the office of the Hon. J. B. Jones, of Newark. Was admitted to the bar in 1869, and commenced the practice in the city of Newark, which he has



HON. JOHN P. MURPHY, CINCINNATI, O.  
Common Pleas Judge.

John P. Murphy, one of the new common pleas judges of Hamilton county, was born in Killarney, County Kerry, Ireland, June 24, 1844, and came to the United States when a child. He enlisted in Company K, 5th O. V. I., April, 1861, and in June of the same year reenlisted for three years. He was wounded at the battle of Antietam Sept. 17, 1862, and for gallantry in that battle received a medal of honor from congress. After being discharged from the army he learned the machinist's trade, which he quit to attend Antioch College. After taking a partial course at that institution he studied law and was admitted to practice in 1873. He served two terms as prose-

cuting attorney of the police court of Cincinnati. He is married and lives at Bond Hill, Hamilton county, Ohio.



HON. WM. H. HUBBARD, DEFIANCE, O.  
Common Pleas Judge.

William H. Hubbard, who was elected common pleas judge of the second subdivision of the third judicial district of Ohio, was born April 13, 1850, at Middletown, Conn. The Hubbard family in the United States, from the old revolutionary stock down, have always succeeded as lawyers. When he was four years of age his father left Connecticut and emigrated to Ashtabula county, Ohio, where he lived until he came to Napoleon in February, 1881. He was educated under the private tuition of Rev. James Bonner. When he was about the age of eighteen years, he commenced the study of law, and read law with the Hon. Laban Sherman and Theodore Hall, of Ashtabula county, Ohio. He was admitted to the state bar by the supreme court at the February term, 1871. He practiced law with success at Napoleon until July, 1885, when he moved to De-

fiance, and entered into a law partnership with W. D. Hill, under the firm name of Hill & Hubbard. In 1873 he was admitted to practice in the United States circuit courts of the northern district of Ohio, and later to the bar of the United States supreme court.

As an advocate he has always ranked very high. The brethren of the bar who may come in contact with him during his incumbency of the common pleas bench, will find him a companionable gentleman, before whom it will be a pleasure to practice.



HON. MILTON CLARK, LEBANON, O.  
Common Pleas Judge.

Milton Clark was born October 27, 1848, in Deerfield township, Warren county, Ohio. His boyhood was spent on his father's farm. At an early age, however, he clearly indicated his preference for books, and chiefly by his own industry, unaided, except by the common schools which he attended, he qualified himself, and taught school for two years. Subsequently, he entered the Ohio Wesleyan University, at Delaware, Ohio, from which institution he was graduated June 26, 1873. Having chosen the profession of law for his life work, he

entered upon his legal studies under the direction of Josiah Morrow, Esq., of the Warren county bar. He also attended the Cincinnati Law School, from which he graduated and was admitted to the bar in April, 1875. After his admission to the bar, he engaged in the practice in Cincinnati until 1879, when he removed to Lebanon, where he has since resided, and successfully practiced his profession.

In November, 1895, Judge Clark was elected to fill the unexpired term of Hon. W. S. Dilatush, deceased, as judge of the common pleas court for the third subdivision of the second judicial district, and in 1896 he was accorded the singular distinction of being nominated and elected without opposition, for the full term beginning February 9, 1897.



HON. JASON A. BARBER, TOLEDO, O.  
Common Pleas Judge.

Jason A. Barber was born at Ionia, Mich., in 1855. His parents then resided there on a farm. At the age of eight he came with them to Ohio. He was educated in the common schools and in 1872 entered the preparatory department of Oberlin College, and graduated from that institution in 1879. He then taught school two years, studied law, and was admitted to the bar in 1882. He soon opened an office at Toledo, and has continued to practice there, with marked success, until he now goes up to the

higher position to which he was chosen at the last election. He was elected prosecuting attorney of Lucas county in 1890, and reelected in 1893. It may be said to the credit of Judge Barber, that he has carved out his own career, and that his success has been due to his own vigor and enterprise, he never having been aided by any person financially.



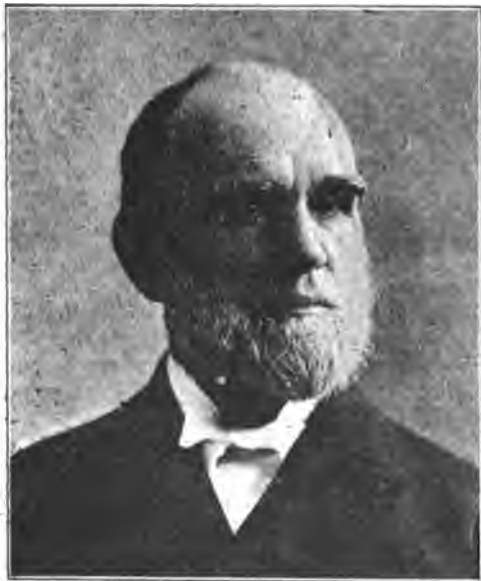
HON. JAMES C. TOBIAS, BUCYRUS, O.  
Common Pleas Judge.

James C. Tobias is the newly elected common pleas judge in the second subdivision of the tenth district. His opponent was Judge Kohn, of Tiffin, who was appointed to the circuit bench by Gov. Bushnell to fill the vacancy caused by the resignation of Judge Henry W. Seney.

Judge Tobias was born in Franklin county, Pa., Nov. 11, 1856, and, like many Americans who have attained positions of honor and dignity, he was reared on a farm. While still a young lad he removed with his father to Crawford county, Ohio, his present home. At the age of seventeen the subject of our sketch, with ambitious hopes for the future, left the farm for Mt. Union College, this state, where he received his education. His pluck and perseverance

were tested at the threshold of life, for he was compelled to pay his way through college by teaching school, and he laid the foundation of his legal career by reading law at night, while following the vocation of pedagogy. After his admission to the bar he commenced the practice at Bucyrus, forming the partnership of Tobias & Monnett. His former partner is now the attorney general of the state. After building up a successful practice he entered politics and was elected probate judge. He served two terms and made an enviable record as a careful, painstaking and upright judge. After his retirement from the office of probate judge he again entered the practice of his profession, forming a partnership with Horace Holbrook. He has seen twelve years on the Bucyrus board of education, and has been president of the board for seven years last past. He is married to the daughter of the late William Monnett.

Judge Tobias will assume his judicial duties next Monday as his predecessor, Judge Caleb H. Norris, of Marion, goes on the circuit bench on the same day.



HON. THOMAS T. McCARTY, CANTON, O.  
Common Pleas Judge.

Thomas T. McCarty is a native of Carroll county, where he grew to manhood. He studied law in Carrollton, and was

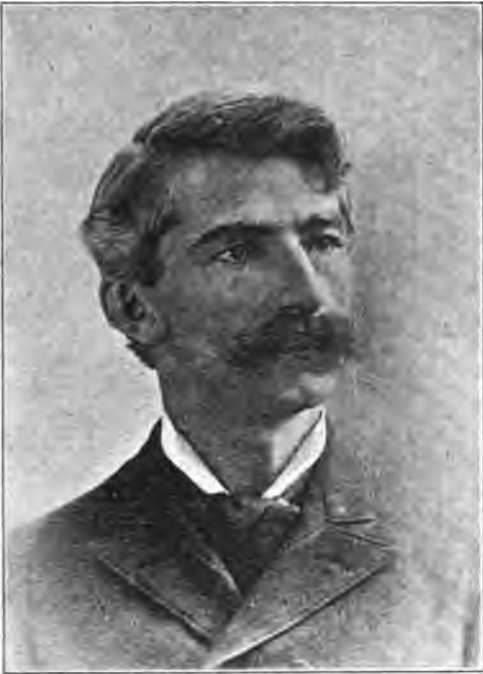
admitted to the bar there in 1865. Removed to Canton in 1878, and for a short time was the law partner of J. J. Parker, Esq., now of Chicago. In 1882, he and Judge Mong formed a partnership which continued until February 9, 1892, when Judge McCarty went on the bench, he having been elected as judge of the common pleas court at the preceding November election.

He was re-elected November 3, 1896, and will begin his second term on February 9, 1897. His record as a citizen, lawyer and judge is one of which any person may be justly proud.



HON. HENRY COLLINS, MANCHESTER, O.  
Common Pleas Judge.

Henry Collins was born in Adams county, Ohio, in 1852. He obtained his education in the public schools and the Ohio Wesleyan University, Delaware, Ohio. He read law with Col. O. F. Moore, Portsmouth. He was elected prosecuting attorney from Adams county in 1878. In 1891 he was elected as common pleas judge in the judicial subdivision comprising Adams, Brown and Clermont counties, and reelected in 1896; the subdivision having been changed so as to comprise Adams, Pike, Scioto, Lawrence and Jackson counties.



HON. F. E. DELLENBAUGH, CLEVELAND, O.

Common Pleas Judge.

Frank Everett Dellenbaugh, was born in the village of North Georgetown (founded by his great grandfather Christian Dellenbaugh), Columbiana county, Ohio, October 2, 1855. His parents, Dr. C. W. Dellenbaugh and his mother, Sarah A. Dellenbaugh, *nee* Everett, moved to Cleveland when Frank was considerably less than one year old, where he has lived ever since.

His education was received in the district schools of East Cleveland township, the Cleveland Academy, and the Western Reserve College. He studied law in the office of his uncle, Charles D. Everett, Esq., and subsequently in the office of E. Coppe Mitchell, Esq., Dean of the Law Faculty of the University of Pennsylvania; and was also a student in the law department of said university.

In 1876 the Centennial Commission appointed him inspector in the finance department of the Centennial Exhibition.

The honorary degree of Bachelor of Law was conferred upon him by the Ohio State and Union Law College, July, 1877.

He was admitted to the bar of Ohio

March 21, 1878, and on the same day, just one year thereafter, admitted to practice in the United States courts. Mr. Dellenbaugh practiced law alone until 1878, and then formed a partnership with Albert H. Weed, Esq., under the firm name of Weed & Dellenbaugh, which continued until 1882, when he formed a partnership with Charles D. Everett, his uncle, and also one of his old preceptors. Everett & Dellenbaugh continued as a law firm until 1885, when the working force of the firm was increased by the addition of Albert H. Weed, Esq., his original partner. Everett, Dellenbaugh & Weed, after its organization, remained in existence without change until the withdrawal of Mr. Dellenbaugh, caused by his going upon the bench on the 19th day of April, 1895. He was appointed Judge of the court of common pleas to fill a vacancy caused by the resignation of Judge John C. Hutchins. He was elected November 2, 1896, to the same position by a large majority.



HON. CYRUS NEWBY, HILLSBORO, O.

Common Pleas Judge.

Cyrus Newby was born and raised in Highland county. He was admitted to the bar and commenced practice at Hillsboro in the year 1877, and continued the

practice at that point until going upon the bench.

In 1891 Judge Newby was selected as the Republican candidate for common pleas judge in the second subdivision of the fifth judicial district, composed then of the counties of Fayette, Highland and Ross, and was elected at the November election of that year.

Last year he was again nominated, by acclamation, for a second term in said subdivision, now composed of the same counties as before, with Madison and Pickaway counties added, and was elected to succeed himself at the late November election.



HON. JAMES B. KENNEDY, YOUNGSTOWN, O.

Common Pleas Judge.

James B. Kennedy was born at Youngstown, Ohio, Nov. 20, 1862. His home has subsequently been at this city. He was educated at the public schools, Poland Seminary, and the University of Michigan. In 1890 he was elected prosecuting attorney of Mahoning county, and reelected in 1893. He was elected to the common pleas bench at the recent November election.



HON. JOHN F. NEILAN, HAMILTON, O.  
Common Pleas Judge.

John F. Neilan, the judge elect for the first subdivision of the second judicial district, was born in Ireland, fifty-one years ago. He came to the United States with his parents before he was five years old; resided in the state of Connecticut until 1857, when the family came to Ohio where they have resided for the last forty years. The future judge was raised on a farm, performing the usual work of a farmer's boy until he arrived at majority, when he determined to carve out for himself a name and position better than the drudgery of the farm offered. With this object in view he prepared himself to teach school, which honorable occupation he followed for six years.

While teaching school he prepared himself for admission to the bar; was admitted to practice April, 1873, from which date he has devoted his entire time, talents, and energy to the practice of his profession with great success. He has also been admitted to practice in the United States supreme, circuit and district courts.

Mr. Neilan was elected city solicitor of Hamilton for two terms, and was prosecuting attorney of Butler county for five years. He served as one of the board of trustees of Miami University for nine years' during which time he took an ac-

tive and very conspicuous part in the management of that institution. He has a great admiration for education and educational institutions, one reason being that he never had the opportunity of getting an education himself or attending any educational institution since he was ten years old.

He is a man of great decision and force of character, of tireless industry and perseverance, and with over eight hundred cases on the docket of his county alone, the accumulation of years, there is abundant material for the exercise of his energy, industry and perseverance.

Mr. Neilan is a married man, having a wife and four children, two sons and two daughters.

Another attack on special legislation was made in the supreme court last Monday, which involves the act passed May 21, 1894 (91 O. L. 376), and which authorizes the commissioners of Wyandot county to print their report in pamphlets letting the job to the lowest responsible bidder, instead of inserting it in two newspapers of general circulation and opposite parties, as the commissioners of other counties are required by law, to do. The attack was made by an editor of an Upper Sandusky paper, who claims that the subject matter of the act is of a general nature and common to all the counties in the state, and that laws relating to it, must, under the constitution be of a uniform operation, and the act in question he therefore claims is unconstitutional, and invalid.

In a case tried before Judge Hollister of the Hamilton common pleas, last week, which case was brought on a covenant in a lease of the property at the southwest corner of Vine and Seventh in Cincinnati for twenty years, expiring January 1, 1895, wherein the lessor agreed with the lessee to pay him the "cash value of all good and fitting permanent brick buildings, suitable to the

location, that may be on said leased premises at the end of the term aforesaid."

Judge Hollister charged the jury that the kind of buildings contemplated by the parties was "such brick buildings as the lessee would leave on the premises at the expiration of the lease, as were composed of good materials, well put together; which, in point of construction, architecture, height, appearance, age and adaptability for use and occupancy, would compare favorably with the permanent buildings in that locality; and that the buildings were not to be of a temporary character, but were to be substantial, strong, durable, lasting and capable of being useful, not for a few years, but for a great many years to come," and the jury were directed that "by location" is meant for the purpose of this case, "that part of town," "the vicinity," "the neighborhood," including and comprehending such area as that, within it, a man of ordinary intelligence, with ordinarily good eyesight, standing on the corner of Vine and Seventh, and looking northwardly and southwardly on Vine street and eastwardly and westwardly on Seventh street, might distinguish the height, general character and general appearance of buildings; and that the measure of damages was the cost of the buildings in question new on the first of January, 1895, less depreciation to the buildings through age and wear and tear from the time of construction to January 1, 1895."

#### SUPREME COURT OF OHIO.

##### Official Record of Proceedings.

##### General Docket.

TUESDAY, February 2, 1897.

3853. Lewis W. Irwin, Adm'r, v. C. A. Webster, Treas. Error to the circuit court of Hamilton county. Judgment affirmed.

4026. William Dougherty v. The Wheeling & Lake Erie R'y Co. Error to the circuit court of Jefferson county. Judgment affirmed, it appearing one ground of reversal by the circuit court, of the judgment of the common pleas, may have been that the judgment was against the evidence. Other questions not passed upon.

4027. Isaac Graveson v. The Cincinnati Life Association. Error to the circuit court of Hamilton county. Judgment affirmed.

4084. William W. Feike, Adm'r, etc., v. C. A. White. Error to the circuit court of Brown county. Judgment affirmed.

4085. The Toledo and Ohio Central R'y Co. v. The City of Fostoria, Ohio. Error to the circuit court of Seneca county. Judgment affirmed.

4430. Manfred Willard, Ex'r, et al. v. J. A. O. Yeoman et al. Error to the circuit court of Fayette county. Judgment affirmed. Williams, C. J., not sitting.

4432. The Citizens' Electric R'y, Light and Power Co. v. The Board of Commissioners of Richland county. Error to the circuit court of Richland county. Judgment affirmed.

4445. Catherine Bashold, Adm'r, et al. v. John Pfannsteil, Jr., Guardian, et al. Error to the circuit court of Cuyahoga county. Judgment affirmed.

4463. John L. Felix v. Albert L. Griffith. Error to the circuit court of Cuyahoga county. Judgment reversed and judgment for plaintiff in error.

4490. Elizabeth Saunders v. Hattie Knoop. Error to the circuit court of Miami county. Judgment affirmed.

4815. Pullman Palace Car Co. v. Anna Bruns. Error to the superior court of Cincinnati. Dismissed by consent, upon application of plaintiff in error at its costs.

5106. Franklin Alter v. The City of Cincinnati et al. Error to the circuit court of Hamilton county. Judgment modified.

5107. W. M. Ampt v. The City of Cincinnati et al. Error to the circuit court of Hamilton county. Judgment modified.

5108. W. M. Ampt v. The City of Cincinnati et al. Error to the circuit court of Hamilton county. Judgment affirmed.

5303. The State of Ohio v. Joseph C. Hutchinson. Bill of exceptions to the court of common pleas of Franklin county. Exceptions sustained.

5388. George Zellers et al. v. Francis Felix. Error to the circuit court of Cuyahoga county. Dismissed by consent at costs of plaintiffs in error.

5428. The State of Ohio ex rel. Edwin Phifer v. Elmer C. Bolton. In *quo warranto*. Judgment for defendant.

#### General Docket.

The following causes on the General Docket have been dismissed for failure to file printed records:

4761. Chas. Schwenker v. Amx Abram C. Doney. Error to the circuit court of Franklin county.

5304. Elijah Hunt, Supervisor, et al. v. Jacob E. Neds. Error to the circuit court of Franklin county.

5647. Louis Koblitz et al., partners v. T. D. Crocker. Error to the circuit court of Cuyahoga county.

#### Motion Docket.

2846. John T. McGinniss v. The Supreme Council Catholic Benevolent Legion. Motion by plaintiff for leave to file a petition in error to the circuit court of Cuyahoga county. Motion overruled.

2847. Elisha B. Durfee v. Neil N. MacNeill Ex'r. Motion by plaintiff to consolidate cause No. 5407 with cause No. 5092, on the General Docket. Motion allowed.

2848. Bell Brothers & Co. v. Philip Roetinger et al. Motion by plaintiffs to extend time to file printed record to May 1, 1897, in cause No. 5430, on the General Docket. Motion allowed.

2849. The C. C. C. & St. L. Ry. Co. v. Mathew Johnson. Motion by plaintiff for oral argument in cause No. 4888, on the General Docket. Motion overruled.

2850. The State of Ohio v. J. Bohu. Motion by plaintiff for leave to file a petition in error to the circuit court of Cuyahoga county. Motion allowed and cause advanced.

2851. The City of Cincinnati v. Wm. Holmes Adm'r, et al. Motion by plaintiff to advance cause No. 5140, on the General Docket. Motion allowed and request for oral argument noted.

2852. Daniel McFarland v. William C. Draper. Motion by plaintiff to dispense with printed record in causes Nos. 5206, 5207, 5209, 5210, and 5211, on the General Docket, and to hear with No. 5208. Motion allowed by consent.

#### New Cases.

New cases filed in the Supreme Court since January 28, 1897:

5432. Tye Pinkerton Bros. & Co. et al. v. J. M. Connell et al. Error to the circuit court of Morgan county. J. T. Crew, J. A. Ives and McElhaney & Danford, for defendants.

5433. A. M. Hollingworth et al. v. George Burton. Error to the circuit court of Muskingum county. W. H. Ball and J. T. Crew, for plaintiffs.

5434. Michael O'Neil, surviving partner, etc. v. Lutheria S. Dyas. Error to the circuit court of Summit county. Charles Baird and Edwin F. Voris, for plaintiff. Grant & Seiber, for defendant.

5435. Jacob Zuellig v. Catherine Hernertie et al. Error to the circuit court of Cuyahoga county. Deckey, Brewer & McGowan, for plaintiff. Solder & Hogsett, for defendants.

5436. John N. Stockwell et al. v. The General Electric Co. et al. Error to the circuit court of Cuyahoga county. E. Sower, for plaintiffs. Williams & Cushing, for defendants.

5437. The Board of Commissioners of Wyandot county v. The State of Ohio ex rel. Pietro Cuneo. Error to the circuit court of Wyandot county. Ezra Carter and Berr & Bennett, for plaintiffs. T. E. Grosell and D. O. Hare, for defendant.

5438. E. E. Calderwood, assignee, v. L. S. Van Lue. Error to the circuit court of Darke county. D. P. Irwin, for plaintiff. S. V. Hartman, for defendant.

5439. S. E. Brown et al. v. Lorenzo F. Hull. Error to the circuit court of Hancock county. John Poe for plaintiffs. S. P. Harrison, for defendant.

# Ohio Legal News.

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The members of the Licking county bar last Tuesday entertained the retiring judges with a banquet. Hon. J. W. Owens was chosen toastmaster, and speeches were made by Judges J. S. Gill, of Delaware, J. B. Waight, of Mt. Vernon, C.W. Seward and D. A. Allen, of Newark.

The constitutionality of what is known as the Earnhart law, forbidding the sale of accounts outside of the state for collection, was passed upon by the circuit court of the second circuit. That court held the law to be constitutional and hence is of general interest, especially to railroad men. As is generally known, there is no exemption law in West Virginia, while in Ohio the head of a family is entitled to \$500, in lieu of a homestead. In other words he can hold that amount of property against any execution which may be issued against him by a creditor, and until three years ago it was the custom of Ohio creditors to send claims against certain Ohio railway employees, which they could not collect, to places in West Virginia where certain civil officials made it a practice of collecting such claims by obtaining service on the railway companies. The practice became so common that it became necessary to pass a law to prevent the sending of claims outside the state for collection. A test case was carried to the supreme court which held that the word "sale" was not found in the law and that it did not prohibit the selling of accounts. Three years ago Senator M. B. Earnhart introduced a bill incorporating the word "sale" into the law and it was passed by the general assembly. The present law in consequence prohibits the sale of a claim for the purpose of securing its collection outside of the state. The law also provides that if this is done the party whose account is sold can recover from the person selling it the amount collected, with costs, from the debtor whose wages have been seized in another state.



HON. HIRAM L. SIBLEY, MARIETTA, O.

Circuit Judge.

Hiram L. Sibley is of New England ancestry, but was born in, and has always been a resident of Ohio. Having received an early education in both common and select schools, he has supplemented this by constant private study since, being the possessor of a large library, and a diligent student in all branches of learning relating to the law. The honorary degree of M. A. was conferred upon him by Marietta College in 1878; the degree of LL. D. was conferred upon him by Claflin University in 1895.

He was elected clerk of courts for Meigs county, Ohio, in 1860. He resigned this office after going into the union army in August, 1862. He continued in the service of his country until he was honorably discharged in January, 1865, during seventeen months of which period he was a prisoner of war in confederate prisons.

He was admitted to the practice of law on April 14, 1865, but did not enter upon the practice until September, 1866, the intervening time being spent in further study preparatory thereto. He continued in active practice, with the exception of a year in which his health

did not permit it, until he went on the common pleas bench. He has three times been nominated and elected as judge in the third subdivision of the seventh judicial district, his nomination in each case being by acclamation, and the subdivision one in which the Republican nomination insures an election. He has served about thirteen years upon the common pleas bench, during which time he has never missed a day of official duty.

He is the author of a volume on the Organic Law of the Methodist Episcopal Church and of an improved form for the constitution of that church, which have been highly commended. Papers written by him on divorce, and the principles which should mould the law on that subject, have attracted the attention of distinguished students in that field and received their approval.



HON. JOHN K. ROHN, TIFFIN, OHIO.

Circuit Judge.

John K. Rohn was born on a farm about two miles east of Tiffin on the 5th day of April, 1859. Attended district school until fifteen years of age, when in 1875 he entered Heidelberg College, Tiffin, and graduated from that college June 19, 1879, at the age of twenty.

Taught school the winter of '79 and '80 and then in October, 1880, entered the law office of Messrs. Noble & Adams, of Tiffin, O., and was admitted to the bar by the supreme court at Columbus, Oct. 2, 1882, since which time he has been in active practice in the law until appointed by Gov. Bushnell, Sept. 1, 1896, as judge of the circuit court for the third circuit to succeed Hon. Henry W. Seney, resigned. Was, also, on the 23d of July, 1896, nominated by the Republican convention at Lima as a candidate for circuit judge for the third circuit, but was defeated.



HON. P. M. SMITH, WELLSVILLE, O.

Common Pleas Judge.

P. M. Smith is a native of Columbiana county and spent his youthful days on his father's farm near Wellsville. He was educated at the common schools and at Mt. Union college, read law in the office of that fine lawyer and judge, the late Judge Nichols, and commenced practice in Wellsville in 1879.

He rose rapidly in his profession and is widely and favorably known in this part of the state. His practice was one of the largest and most lucrative of any attorney in the county. In 1886 he was elected prosecuting attorney, and served

the state for two terms ably and faithfully.

In December, 1895, he was appointed, at the practically unanimous request of the bar of this subdivision, by Gov. McKinley to fill a vacancy on the common pleas bench. As a judge he is courteous, impartial, and fearless in the discharge of his duties. His decisions show culture and deep learning.



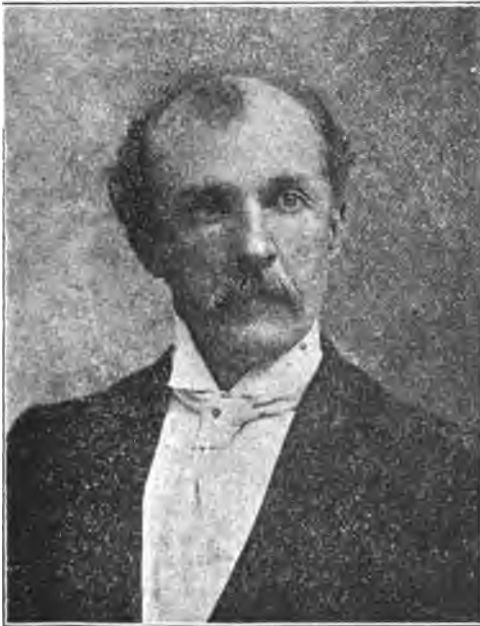
HON. SAMUEL A. WILDMAN, NORWALK, O.

Common Pleas Judge.

Samuel A. Wildman was born in Clarksfield, Huron county, March 28, 1846. He is the son of Frederick A. Wildman, a resident of Norwalk, Ohio. At the age of fifteen he entered a printing office, but when not quite eighteen years old, in February, 1864, he enlisted as a private in the 25th Ohio infantry volunteers, and served until the muster out of the regiment on June 18, 1866, more than a year after the close of the war. His rank at muster out was that of sergeant. In 1867 he entered Western Reserve College at Hudson, Ohio, but did not complete his course. Upon leaving college he began the study of law, was admitted to the bar in 1870, and has been engaged in practice ever since. He was for years president of

the board of education and trustee of the Firelands' Historical Society, and has been for more than twenty years secretary of the Whittlesey Academy of Arts and Sciences. He was the nominee of the Republican party for circuit judge in 1887, and was defeated by a plurality of only forty-three votes in a total vote of about 57,000. In two Republican state conventions he was urged by his friends for supreme court judgeship, and each occasion with some half dozen candidates in the field, was second only to the successful aspirant in the number of votes of delegates received. His nomination for the common pleas court was unsought by him, and it was only upon the urgent request of the bar of his county that he consented to become a candidate. At the election for the office last named, he handsomely led the Republican ticket in Huron county.

Mr. Wildman has been one of the leaders of the Norwalk bar, ranking as one of its brightest ornaments. His literary ability is of a very high order. He was married on July 13, 1870, to Ellen Elizabeth Howe, daughter of Salem T. Howe, of Norwalk, Ohio.



HON. D. W. JONES, GALLIPOLIS, O.  
Common Pleas Judge.

D. W. Jones was born in Vinton county forty years ago. He was educated at the United States Naval Academy at Annapolis, Md., where he spent the years from 1872 to 1876. In the autumn of 1876 he began the study of law in the office of his brother, the late Homer C. Jones, of McArthur, and was admitted to practice in 1879. While studying law he taught school two years in the McArthur High School.

In June, 1880, he went to Gallipolis and began the practice of law in connection with his brother, under the firm name of Jones & Jones. Three years later he formed a partnership with Hon. S. A. Nash, which is now dissolved by his appointment to the bench. This firm enjoyed a large practice, in which Judge Jones always took an active, and in late years, a leading part. In 1887 he was elected prosecuting attorney of Gallia county, and served two terms. About eight years ago he was married to Miss Laura Shober. This union has been blessed by three charming children.



HON. THOMAS M. BIGGER, COLUMBUS, O.  
Common Pleas Judge.

Thomas M. Bigger is a native of Washington county, Pa., and received his common school education in that

state. He remained upon the farm until the winter of 1878-9, when he entered Hopedale Normal College, Harrison county, Ohio, where he remained three years. He entered the junior class at Wooster University in 1881, and graduated in the class of 1883. The following year he taught in Hopedale College, employing his leisure time in the study of law. Came to Columbus in 1884, and completed his legal studies, being admitted to the bar in 1885, and at once entered upon the practice. In 1889 he was the candidate of the Republican party for state senator in the Franklin-Pickaway district, but was defeated. In 1894 he was nominated for police judge of the city of Columbus, and was elected. He was nominated for common pleas judge on May 23, 1896, and was elected. The office to which he is elected is the original judgeship, the term beginning on February 9.



HON. O. W. H. WRIGHT, LOGAN, O.  
Common Pleas Judge.

Oliver W. H. Wright was born in Perry county, Ohio, April 10, 1856. In 1862 he moved with his parents to Hocking county. He attended the Logan high school, from which he was graduated with the class of 1876. He then took up the avocation of teacher in the public schools of Hocking county, devoting his leisure hours to the study of law

text books privately. This course he continued for three years when he entered the office of Judge S. H. Bright, to complete his legal studies, teaching during the winter months. He was admitted to the bar by the supreme court at Columbus, April 1, 1879, and at once began the practice of law in partnership with his preceptor, under the firm name of Bright & Wright.

In 1880, Mr. Wright was elected city clerk of Logan, to which office he was reelected in 1882. In 1883 he was elected a member of the board of education, serving in that capacity up to the present time, making a term of fifteen years, thirteen of which he was president of the board.

In the fall of 1896 he was made the nominee of the Democratic party for the position of common pleas judge, to fill the unexpired term of Judge Huffman, deceased, of New Lexington, Ohio, and was elected. He was married in December, 1879, to Miss Lelia Houston, daughter of Jas. E. Houston, of Logan. They have three children and reside in a beautiful home on Main street, Logan, Ohio.



HON. S. W. SMITH, JR., CINCINNATI, O.  
Common Pleas Judge.

Samuel W. Smith, Jr., was born in Cincinnati on August 24, 1859. He attended and graduated from Chickerin

Institute and afterwards graduated from Brown University. In 1882 he began the practice of law, and at the time of his election to the judgeship of the common pleas bench, was a member of the firm of Stephens, Lincoln & Smith.



HON. HENRY C. WHITE, CLEVELAND, O.  
Probate Judge.

Henry Clay White, the present probate judge of Cuyahoga county, Ohio, was born in the town of Newburg in said county on the 23d day of February, 1839; he was partly educated at Hiram college, in the institution which preceded the founding of that college at that place, being under the educational direction for many years, of the late President Garfield. In October, 1860, he entered the department of law of the University of Michigan at Ann Arbor, and for two years studied there and graduated thence as Bachelor of Laws, in April, 1862. He returned to Cleveland and entered the law office of the firm of the late Honorable Samuel B. Prentiss and Hon. C. C. Baldwin, late judges of the court of common pleas, and circuit judge of the eighth judicial circuit, respectively. Mr. White was admitted to the bar in September, 1863, but the business in the courts being seriously de-

creased by the pending civil war, he entered the service of the clerk of the courts of Cuyahoga county as deputy clerk, and continued in that service for ten years, entering into the active duties of his profession in 1874; thence, until the fall of 1887 he continued the practice of his profession in Cuyahoga county and acquired a fairly good practice, and in the fall of 1887 became a candidate upon the Republican ticket for probate judge. He was duly elected and took office on the 9th of February, 1888, and has been re-elected four terms since by increasing majorities, and is now serving his fourth term as probate judge. Judge White has also taken some interest in literary and historical studies, and is at present engaged in teaching probate and testamentary law in the F. T. Backus Law School of the Western Reserve University, and Medical Jurisprudence in the Cleveland Medical College.

The degree of Master of Arts was conferred upon him by Hiram College, in 1892.



HON. FERD. JELKE, JR., CINCINNATI, O.  
Common Pleas Judge.

Ferdinand Jelke, Jr., who at the last election was elected judge of the common pleas court of Hamilton county, was born in Cincinnati September 20, 1861. He attended Princeton College,

graduating in 1884, receiving the degree of A. B. In 1886 the University of Cincinnati conferred upon him the title of LL. B., and in 1887 Princeton made him an A. M. In 1887 also he began the practice of law, after having spent some time at the University of Goettingen. He also served as mayor of Avondale, having been elected to that position in 1894.



HON. ALVIN W. KUMLER, DAYTON, O.  
Common Pleas Judge.

Alvin W. Kumler was born on a farm near Trenton, Butler county, Ohio, January 20, 1851. He is a son of John and Sarah Landis Kumler who were pioneer residents of that county. He worked upon the farm, attending the public schools in the vicinity at such times as he could be spared from the farm until he was twenty years old, having prepared himself for college in the meantime, and in the fall of 1871 entered Antioch College at Yellow Springs, Ohio, where he remained for two years, and then entered the junior class, being the class of '75, at Ohio Wesleyan University, at Delaware, Ohio, where he remained for two years. In the fall of 1873 Judge Kumler entered the Law

School of Michigan at Ann Arbor, and graduated from that institution in 1875. He practiced law at the Dayton bar by himself until January 1, 1877, when he formed a partnership with Hon. R. M. Nevin, under the firm name of Nevin & Kumler, which partnership existed until he went upon the bench in November, 1896.

Judge Kumler was nominated and elected city solicitor of Dayton, by a popular vote in 1879, and was reelected in 1881, having carried a Democratic city by large majorities each time, for four years holding that important office with great credit to himself, and honor to his party.

In March, 1896, while confined to his home by severe illness, he was nominated by a primary vote of his party in Montgomery county for common pleas judge. He was elected in the following November without opposition, taking his seat November 23, for five years. The judge is unmarried.



HON. J. A. MANSFIELD, STEUBENVILLE, O.  
Common Pleas Judge.

John A. Mansfield was born on a farm in Wayne township, Jefferson county, Ohio, September 20, 1854. His grandfather settled in Jefferson county, in

1797. John worked on the farm and attended the public schools until seventeen years of age, when he attended Hope-dale Normal College, for a few years. In 1877 he entered the law department of Michigan University and graduated therefrom in March, 1879.

He was admitted to the bar April 16, 1879, at Steubenville, at which place he commenced the practice of law in September, 1879. In 1881, he entered into a law partnership with Hon. W. C. Ong, which continued until Mr. Ong's removal to Cleveland. He then formed a partnership with W. A. Walden, which continued until Mr. Walden's removal to Columbus, Ohio, in 1885. In 1887 he was elected probate judge of Jefferson county, without opposition and reelected in 1890. In 1891 he was nominated and elected judge of the court of common pleas and reelected in 1896.

On February 2, 1892, he resigned the office of probate judge, and February 9, 1892, entered upon the duties of judge of the court of common pleas.



HON. F. S. SPIEGEL, CINCINNATI, O.  
Common Pleas Judge

Frederick S. Spiegel was born November 20, 1856, in the village of Hovestadt, Prussia. In 1867 his parents emigrated

to Gadsden, Alabama, where members of his family had settled prior to the civil war. Here he attended the Southern Institute, graduating in 1873. He then went to Cincinnati, and obtained a position as proof reader in the old Franklin Type Foundry. He was called from the type foundry to the editorial staff of the Cincinnati Volksblatt, by the late Frederick Hassaurek, and upon his advice, while with him, began the study of law, in 1878, with Judge Clement Bates, his present law partner, then the corporation counsel of Cincinnati. He attended the Cincinnati Law School and graduated therefrom in 1880, in the class containing Judges William Taft, Howard Hollister, and Alfred Benedict, as well as other young men who have since made their mark in the law.

He was chief statistician under secretary of State Chas. Townsend in 1880, in which capacity he published two volumes of Ohio Statistics. After his term of office ended, in 1883, he returned to Cincinnati to engage in the practice of law. In 1890 he was elected county solicitor of Hamilton county, and reelected in 1893. In 1896 was elected common pleas judge. His name will be recognized by Republicans, as, during the last campaign, he stumped the state of Ohio for nine weeks, daily speaking as the occasion required it, in either English or German. He is happily married, has three children, and lives on Walnut Hills, Cincinnati, Ohio.

Judge King of the Lucas circuit court, rendered an important decision this week, regarding the right of a property owner to rent for saloon purposes. The owner rented his premises to be used for saloon purposes, and on failure of the tenant to pay rent, sued for its collection and the court of common pleas decided that the lease was null and void on account of the premises being used for the sale of intoxicating liquors, and that therefore the lessor could not recover for rent. This decision was reversed by the circuit court, the entire court being unanimous in deciding that the contract was valid in law, and that the lessor was entitled to the rent under the lease.

Judge Buchwalter, of the Hamilton common pleas, has announced the most equitable rule yet announced by any court of this state, regarding the assessments made against the shareholders of an insolvent building association. The Judge in his decision holds that every member of a building association is liable to contribute in the same proportion in which he would be entitled to share in any profits; and when, under the present law, the association limits by its constitution the mortgage members from sharing in any profits except as to dues paid into the credit of capital during each current year, so also is their liability to contribute to the losses and expenses of the association limited thereto.

The following decision rendered by Solicitor Kaiser, of Cuyahoga county, regarding the new salary law, is an important one and is as follows:

"To the Board of County Commissioners: I have had under consideration the annexed bill of Theodore F. McConnell, sheriff, for \$126.62 for money expended by him, through his deputies for feeding, shoeing, and hiring horses, street car fare, telephone, telegrams, toll, railroad fare, and repairing buggies during the month of January, 1897; and in respect thereto I have to say that, as shown by the entry found on journal 126, page 2, of the court of common pleas, the judges of that court fixed 'the sum of \$14,500 as the aggregate sum to be expended yearly for the compensation of all deputies, bookkeepers, clerks, and other assistants of the said Theodore F. McConnell as sheriff of said county.'

"The journal entry further provides: 'and such sum shall be in full of all compensation or allowance to such deputies, clerks, bookkeepers, and assistants for the discharge of any and all duties imposed upon them by their position aforesaid.'

"My information is, that in arriving at said sum of \$14,500, the judges took into account and provided for the very classes of expenses named in this bill, with the single exception of the item 'street car fare for prisoners, forty-five cents.'

"The county having thus once provided for the payment of said expenses, it is, in my opinion, unlawful for you to make any further allowance therefor. I therefore advise the rejection of the accompanying bill, except the forty-five cents above especially named."

#### IN MEMORIAM.

##### A Tribute to Ex-Judge Mallon.

After the new judges of Hamilton county had taken their seats in the common pleas court last Tuesday morning, the joint session. Judge Wright presiding, proceeded to receive the report of the committee of ex-judges of that court, appointed some weeks ago to prepare a tribute to the life and services of the late Judge Patrick Mallon.

The committee consisted entirely of ex-judges of the tribunal, which the eminent deceased also presided over just forty years ago, as follows: Judges Oliver, Shroder, Huston, Maxwell, Conner, Avery, Bates, Moore, Robertson, Fayette, Smith and Manning F. Force.

Letters were received and read from former judges, M. F. Force and Fayette Smith, in which they deeply regretted their inability to be present, and spoke of the integrity, and faithfulness and purity of purpose of their departed friend. After the reading of these letters, Judge Oliver, as chairman, presented the report of the committee, which was as follows:

"The court of common pleas, first judicial district of Ohio, in joint session, having appointed the undersigned a committee to prepare and report to the joint session a memorial upon the late Hon. Patrick Mallon, we beg leave to report to Your Honors the following:

"Patrick Mallon was admitted to the bar in 1848 at the age of 25 years. He at once entered upon the duties of his chosen profession, manifested superior ability, and met with marked success. His sunny disposition, gentlemanly deportment, and strong and unflinching sense of honor could not fail to command the respect and esteem of all who came in contact with him.

"In 1856 he was elected a member of this court, and took his seat upon the

bench on the ninth day of February, A. D. 1857, and served the full term of five years.

"How he acquitted himself in the discharge of his judicial duties may be fittingly stated in few words. Ever diligent, painstaking, conscientious, and of unswerving uprightness of purpose, he compelled both the respect and admiration of the bar and of all others coming before him. Upon retiring from the bench, he resumed the practice of his profession, and during his after life continued to enjoy the respect and highest regard of all who knew him.

"Few have been more successful in obeying the precept: 'Deal justly, have mercy and walk humbly before God.'

In all the relations of his life he made manifest the richest fruits of our civilization. There was no Phariseism in the make up of Patrick Mallon. His life was a blessing, and now that he has been taken from us we will cherish the memory of him as a rich legacy.

"In submitting this memorial, your committee beg leave to say, that they do so with mingled feelings of sorrow and joy; sorrow at the loss of his presence here, and rejoicing over the record of the life he lived amongst us.

M. W. OLIVER,  
J. SHRODER,  
A. B. HUSTON,  
S. N. MAXWELL,  
JOHN S. CONNER,  
WM. L. AVERY,  
CLEMENT BATES,  
FRED'K W. MOORE,  
C. D. ROBERTSON,  
FAYETTE SMITH,  
M. T. FORCE."

#### SUPREME COURT OF OHIO.

Official Record of Proceedings.

Causes to and including No. 4568, on the General Docket, are called and marked submitted.

COLUMBUS, February 2, 1897.

General Docket.

4432. The Citizens' Electric Railway, etc., v. The Commissioners of Richland county. Error to circuit court of Richland county.

MINSHALL, J.

An ordinance adopted by a city council under section 3438, Revised Statutes, simply confers on a street railway company the corporate power to extend its road over a state or county road. In the exercise of the power, the right to so extend its road, can only be acquired by agreement with the commissioners or by condemnation; and where a company so extends its road over a state or county road beyond the city limits, without such agreement or condemnation, its acts are unlawful, and a recovery of the damages caused to the road, may be had at the suit of the county commissioners under section 883, Revised Statutes.

Judgment affirmed.

3853. Lewis W. Irwin, Admr. v. Lombard University. Error to the circuit court of Hamilton county.

SHAUCK, J.

The consideration for a promissory note executed to an incorporated college is the accomplishment of the purposes for which it is incorporated and in whose aid the note is executed; and such consideration is sufficient.

Judgment affirmed.

5083. William Gaylord et al. v. R. S. Hubbard, Treas. Error to the circuit court of Cuyahoga county.

BRADBURY, J.

Section 5 of an act passed April 13, 1892, (49 Ohio Laws, 283), "To provide for the appointment of a board of equalization and assessment in cities of the second grade of the first class," confers on the annual board of equalization created by the act, powers that substantially differ from those conferred upon all other annual boards of equalization in this state by the general statute upon that subject, and for that reason conflicts with section 26 of Article 2 of the constitution of this state, and is void.

Judgment reversed.

4463. John F. Felix v. Albert L. Griffiths. Error to the circuit court of Cuyahoga county.

SPEAR, J.

1. At common law where there is a covenant on the part of the lessee to pay rent for the term, and buildings on the demised premises are destroyed by fire, the tenant is not relieved from the payment of rent unless he has protected himself by a provision in the lease to that effect.

2. In giving construction to a provision of a statute, or a contract, which attempts to abrogate, or modify, a well established rule of the common law, the scope of the provision should not be extended beyond the plain import of the words used if reasonable effect can otherwise be given to it.

3. A lease for years, at a rental of \$1,500 per year, payable \$125 monthly in advance, contained the following clause: "It is agreed by and between the parties to this lease, that in case any building now standing on said premises shall be destroyed or injured by the elements or other cause, so as to be unfit for occupancy, without any fault or neglect on the part of the second party, said second party shall not be liable to pay rent for said premises

from and after the time the said second party shall have surrendered possession of said premises to said first party." After payment, during the term, of a month's rent, and before the expiration of the month, a fire occurred, without fault of the lessee, which so injured the buildings as to render them unfit for occupancy. Thereupon the tenant surrendered possession and brought action to recover of the lessor a portion of the advance payment, claiming it as still unearned.

*Held:* That the provision in the lease above quoted reserves no right to recover back any portion of a monthly installment of rent once paid, and that the action cannot be maintained.

Judgments reversed, and judgment for plaintiff in error.

5106. *Franklin Alter v. The City of Cincinnati et al.*

5107, 5108. *W. M. Ampt v. The City of Cincinnati et al.* Error to the circuit court of Hamilton county.

BURKET, J.

1. Under section 6 of article 8 of the constitution, a city is prohibited from raising money for, or loaning its credit, to or in aid of, any company, corporation, or association; and thereby a city is prohibited from owning part of a property which is owned in part by another, so that the parts owned by both, when taken together, constituting but one property.

2. A city must be the sole proprietor of property in which it invests its public funds, and it cannot unite its property with the property of individuals or corporations, so that when united, both together form one property.

3. Section 8 of the act of April 24, 1893, entitled "An act to provide for water works purposes in cities of the first grade of the first class," 92 O. L. 606, is unconstitutional, being in conflict with section six of article eight of the constitution. The remainder of the act, not depending upon said section 8, is a valid statute.

4. The act of April 24, 1893, entitled, "An act to prescribe the purposes for which water rents may be assessed and collected in cities of the first grade of the first class," 92 O. L., 606, is a valid statute.

Judgment in Water Works cases modified and in Water Rent case affirmed.

4442. *The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Harry D. Sheppard.* Error to the circuit court of Franklin county.

WILLIAMS, C. J.

1. It is the settled law of this state that a common carrier cannot, by special agreement, relieve himself from responsibility for his own negligence, nor limit his liability for losses resulting therefrom.

2. A contract made in one state or country to be performed in another, is governed by the laws of the latter, which determine its validity, obligation and effect.

3. Where a railroad company receives live stock in another state, under a contract there made, to transport it to a designated place in

this state, and while the stock is being carried in this state it is injured by the company's negligence, the rights of the parties, in an action for damages for the loss, are governed by laws of this state, and not by those of the state where the contract was made.

4. In an action to recover the value of a trotting horse, evidence of his pedigree, and that some of his blood relations have a record for speed, is competent as affecting his value.

5. When such record is published by authority of a recognized trotting association and the publication is accepted and acted upon by those interested in and conversant with such matters as authentic and official, it is not error to admit evidence of the speed as shown by that record; but the testimony of a witness to information he claims to have obtained from the record is incompetent.

6. One who for ten years has made car building his business, and given special attention to car wheels, and their construction, is competent to give an opinion of the value of the hammer test as a means of discovering defects in car wheels.

Judgment reversed.

5303. *The State of Ohio v. Joseph C. Hutchinson.* Bill of exceptions taken by the prosecuting attorney to the ruling of the court of common pleas of Franklin county.

WILLIAMS, C. J.

1. The United States Pharmacopœia is adopted by the statute providing against the adulteration of food and drugs, (81 O. L., 67 and 87 O. L. 248) as an authoritative compilation comprising accepted and known articles of drugs, with a description of their characteristics and qualities, and an approved standard of their strength and purity.

2. Whiskey is recognized by that name in the Pharmacopœia, where its proper standard of purity and strength is laid down, and is a drug within the meaning of the pure food and drug statute.

3. While that statute is mainly designed for the better preservation and promotion of the public health, it is also directed against frauds resulting from the sale of inferior articles for prices which entitle the purchaser to those that are of the required standard.

4. The provisions of the statute, relating to the sale of drugs, are not limited in their application, to sales by druggists and pharmacists, nor to sales for medicinal or pharmaceutical use, but they extend to all persons without regard to their vocation, and make no distinction on account of the use intended to be made of the article.

5. The sale of whiskey which is adulterated within the meaning of the statute, is an offense against its provisions, though it be sold as a beverage or commercial commodity, and by one who is neither a druggist nor pharmacist. Exceptions sustained.

General Docket.

FRIDAY, Feb. 5, 1897.

2699. *The National Life Ins. Co. v. Blanche S. Brobst.* Error to the circuit court of Huron county. Judgment affirmed.

4050. *Albert Shaw v. The Prudential Ins. Co. of America.* Error to the circuit court of Montgomery county. The judgment rendered by the circuit court after reversing that of the court of common pleas is reversed, and the cause remanded to the common pleas court for a new trial.

4058. *Joseph W. Moffatt et al. v. The Fish and Loan & Building Co. et al.* Error to the circuit court of Hamilton county. Judgment affirmed.

4060. *The Farmers' National Bank et al. v. Carl Lehman et al.* Error to the circuit court of Scioto county. Judgment affirmed.

4106. *George L. Artz et al. v. Stephen C. Phillips.* Error to the circuit court of Ross county. Judgment affirmed.

4113. *John L. Persinger et al. v. E. M. Haigler et al.* Error to the circuit court of Fayette county. Judgment affirmed.

4125. *German Ins. Co. v. Henry D. Merick.* Error to the circuit court of Athens county. Judgment affirmed.

4141. *Peter Bissman v. Wallace McCormick.* Error to the circuit court of Richland county. Judgment affirmed.

4150. *David D. Miller v. Samuel Freiling et al.* Error to the circuit court of Wayne county. Judgment affirmed.

4442. *The Pittsburgh, Cincinnati, Chicago & St. Louis R'y Co. v. Harry S. Sheppard.* Error to the circuit court of Franklin county. Judgment reversed.

5083. *William H. Gaylord et al. v. R. S. Hubbard, Treas.* Error to the circuit court of Cuyahoga county. Judgment reversed and judgment for plaintiff in error.

#### Motion Docket.

2853. *David Davis v. The Pittsburgh & Wheeling Coal Co.* Motion by plaintiff to dispense with printing record in cause No. 5332, on the general docket. Motion allowed.

2854. *Jane Steele et al. v. Samuel Swartz et al.* Motion by plaintiff to retax costs in cause No. 3847, on the general docket. Motion allowed.

2855. *The C. H. & D. R. R. Co. v. Albert Barnes, Admr.* Motion by defendant to advance cause No. 4969, on the general docket. Motion allowed. Briefs of plaintiff to be filed by May 1, 1897, and those of defendant, 60 days thereafter.

2856. *Clement Ohler et al. v. R. B. Gordon, Jr., Auditor, et al.* Motion by defendants to advance cause No. 4719, on the general docket. Motion allowed. Briefs to be filed within rule.

2857. *George Connor et al. v. R. B. Gordon, Jr., Auditor, et al.* Motion by defendants to advance cause No. 4718, on the general docket. Motion allowed. Briefs to be filed within rule.

2828. *Josephine H. McKee v. Israel F. Raudabaugh.* Motion by defendant to dismiss cause No. 4531, on the general docket. Motion overruled.

2859. *The Board of Commissioners of Wyandot county v. The State of Ohio ex rel. Pietro Cuneo.* Motion by plaintiff for stay of execution in cause No. 5437, on the general docket. Motion passed for showing of grounds on support of same.

2860. *The Board of Trustees of the Ohio State University v. Henry P. Folsom et al.* Motion by defendants for extension of time to file briefs in cause No. 4650, on the general docket. Motion allowed.

2861. *The State of Ohio ex rel. Charles E. Pliff, a tax payer, v. Frederick Bader et al.* Motion by defendants to advance cause No. 5377, on the general docket. Motion allowed.

2862. *Lewis Chesrown v. Elmira Morris et al.* Motion by defendants to extend time for printing briefs in cause No. 4763, on the general docket. Motion allowed and time extended to April 5, 1897.

2863. *John Hagerty, Auditor, and Leo Schott, Treas. v. Mary A. Britt.* Motion by plaintiff for oral argument and to advance cause No. 4866, on the general docket. Motion allowed and request for oral argument noted.

#### New Cases.

New cases filed in the Supreme Court since February 3, 1897:

5440. *August Schmitt et al. v. Vincent Schmitt et al.* Error to the circuit court of Cuyahoga county. Hessmuller & Bemis, for plaintiffs. W. S. Kerruish and Heasley & Selzer for defendants.

5441. *The Toledo & Ohio Central Ry. Co. v. John Woodruff.* Error to the circuit court of Hardin county. George E. Crane for plaintiff. James Watt for defendant.

5442. *William A. Geiger, Ex'r v. Albertha Bratten.* Error to the circuit court of Williams county. Potter & Emery for plaintiff. John M. Killits for defendant.

5443. *John T. McGinniss v. The Supreme Council Catholic Benevolent Legion.* Error to the circuit court of Cuyahoga county. James Fitch for plaintiff. Booth, Keating & Peters and Meyer & Mooney for defendant.

5444. *The Press-Post Publishing Co. v. Emmet Brenneman.* Error to the circuit court of Franklin county. George D. Jones for plaintiff.

5445. *Anson S. Springer et al. partners, v. John Y. Williams et al.* Error to the circuit court of Stark county. D. E. Rogers for plaintiffs. J. W. Craine for defendants.

5446. *Grant Gariett v. The Standard Life & Accident Ins. Co.* Error to the circuit court of Marion county. Scofield, Durfee & Scofield for plaintiff. J. F. McNeal & Sons for defendant.

5447. *Joseph T. Robinson v. Virginia E. Boyd et al.* Error to the circuit court of Seneca county. McCauley & Weller for plaintiff. Lutes & Lutes and J. R. Wilson for defendants.

# Ohio Legal News.

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Vol. 1 of **Ohio Decisions**, Circuit Courts, began November 23, 1896.

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Hon D. D. Hare, ex member of congress and well known throughout Ohio as a great lawyer, died at his home in Upper Sandusky, Wednesday of last week.

A rural judge was charging the jury in a burglary case recently, and delivered the following instructions: "The crime of burglary is divided into two degrees—burglary in the first degree and burglary in the second degree. All burglaries not of the first degree are of the second degree, and *vice versa*, and having said so much, I leave the case in your hands." The lucidity of the charge would easily penetrate the densest intellect.

The supreme court this week handed down a decision affirming the lower court in the case of *Thomas M. Stacey v. The State of Ohio*. The case has been stubbornly contested and fought through the courts by able counsel on both sides. Stacey, it appears, was a special policeman in the employ of the Pennsylvania railroad company, and lived in Alliance. While endeavoring to arrest a number of men who were riding on a freight train, one of them escaped and ran across a field. Stacey shot and inflicted a wound from which the man shortly after died. Stacey was arrested and found guilty of manslaughter, which decision has now been affirmed by the supreme court.

## A CORRECTION

In our biographical sketch of Hon. David J. Nye of Elyria, which appeared in our issue of the **LEGAL NEWS** for February 6, there occurred a few typographical errors which we wish to rectify. The name of the judge should have appeared as David J. Nye, instead of David T. Nye. His graduation at Oberlin appears as of class of 1870, when it should have been the class of 1871, and his election as prosecuting attorney of Lorain county is given as 1861, when it should have been 1881.



HON. W. P. HOWLAND, JEFFERSON, OHIO.

Common Pleas Judge.

W. P. Howland was born and has always lived in Ashtabula county. He comes from New England stock, his parents being among the earliest pioneers to settle in that portion of the Western Reserve.

His early boyhood was spent amid all the hardships of pioneer life and his education was obtained in the common schools and at Kingsville Academy.

Mr. Howland was admitted to the bar in '61 and practiced law at Jefferson, O., until '67 when he was elected prosecuting attorney, was renominated by acclamation in '69. In '71 he was elected representative was renominated by acclamation and re-elected in '73 and '75. In '77 he was nominated and elected to the state senate.

One of the duties of the sixty-second General Assembly was the election of a United States Senator. Mr. Howland was a strong competitor in a field composed of such men as Alphonso Taft, Samuel Shellabarger, Wm. Lawrence, and Stanley Mathews and on the first ballot was a leading candidate. The prize was finally won by the Hon. Stanley Mathews, Mr. Howland being a close second.

Garfield's election to the United States senate left a vacancy in the 19th Congressional District, and Mr. Howland was a prominent candidate for that position. In the convention 87 votes were necessary to nominate. On the ninth ballot Mr. Howland received 91 votes. There were two more votes cast than there were delegates and the chairman declared the ballot illegal. A motion to adjourn was carried and a deal was made which threw the nomination in another direction.

In the fall of '90 Mr. Holland was elected to the common pleas bench for the subdivision composed of Ashtabula, Lake and Geauga counties, was renominated by acclamation last fall and re-elected by an unusually large majority.



HON. OREN BRITT BROWN, DAYTON, O.

Common Pleas Judge.

Oren Britt Brown was born at Jeddo, Orleans county, New York, June 27, 1853. His parents were Col. E. F. Brown and Elizabeth Britt Brown, both natives of New York. Col. Brown entered the United States service as commander of the Twenty-eighth New

York Regiment in 1861, and lost his left arm at the battle of Cedar Mountain. On the completion of the National Military Home at Dayton, he was in 1868 made governor, retaining the position until 1880, when he was made inspector general of the entire system of national military homes. Judge Brown's early education was obtained in the public schools of Medina, New York, which he attended until he came to Dayton with his father's family in 1869. For two years thereafter he attended the Dayton High School, when he entered Denison University at Granville, Ohio, continuing his studies there for three years. In January, 1874, he entered the sophomore class at Princeton College, from which institution he graduated in 1876. He began his legal studies in the same year in the office of Gunkel & Rowe, prominent practitioners at the Dayton bar. He was admitted to the bar in 1878, and began practice at once. He was nominated for prosecuting attorney in 1879, and defeated by a small majority. In 1881 he was the nominee of the Republican party for clerk of the courts of Montgomery county, and was elected. He served in this position for three years, declining another nomination in order to resume his law practice. He formed a copartnership with Oscar M. Gottschall, under the firm name of Gottschall & Brown, a relation that remained in effect until he went on the common pleas bench in July, 1896. He represented the third congressional district as a delegate in the National Republican Convention at Chicago in 1888. During several campaigns he served as chairman of the County Central Committee, and has represented the party frequently in state conventions. He was chairman of the Montgomery county delegation in the convention held at Zanesville in 1895, which nominated Bushnell for governor, Foraker for United States senator, and McKinley for president. He was for many years president of the board of elections of the city of Dayton, and until he went upon the bench. In June, 1896, upon the unanimous recommendation of the Dayton bar, Judge Brown was appointed by Governor Bushnell to the judgeship of the common pleas court, third sub-

division of the second judicial district, made vacant by the death of Judge Elliott. At the November election of the same year he was chosen judge for the full term of five years.

Judge Brown was married June 12th, 1883, to Miss Jeannette Gebhart, daughter of Simon Gebhart, an old and prominent resident of Dayton.



HON. F. DOUTHITT, NEW PHILADELPHIA,  
OHIO.

Common Pleas Judge.

Hon. Fletcher Douthitt was born in Morrow county, Ohio, February 22, 1840, and reared upon a farm. He attended college at the Ohio Wesleyan University, Delaware, Ohio, and the Iberia College located at Iberia, Morrow county, Ohio. He graduated at the Ohio State and Union Law College, Cleveland Ohio, June 23, 1864, and began the practice of law at Mt. Gilead, Morrow county, and continued there till April, 1873, when he located in Tuscarawas county and there engaged in the general practice of the law.

In 1891 he was elected judge of the 3rd subdivision of the 8th judicial district of Ohio, composed of Tuscarawas, Jefferson and Harrison counties, and was re-elected to the same office at the November election, 1896, with term beginning April 17th 1897.

He served in the Union army from May 20th, 1862, till captured at Harper's Ferry, Virginia, in September of that year, at the surrender of the command of Gen. D. A. Miles, at that place. The capture included nearly 12,000 prisoners, over seventy pieces of artillery and perhaps fifteen thousand muskets and other small arms, but was paroled on the battle field and returned home in October of that year.

He has also held several small offices, such as mayor of Mt. Gilead, member of council and member of the board of education at New Philadelphia.



HON. HOWARD FERRIS, CINCINNATI, O.

Probate Judge.

Howard Ferris was born in Linwood, Hamilton county, Ohio, on August 2d, 1853. His parents being descended from the early settlers of Hamilton county. He attended public schools, and graduated later at Denison University, Granville, Ohio, in 1876.

For two years was principal of the Norwood schools.

Graduated at Cincinnati Law School in 1879, and at once entered into part-

nership with the late Judge Cowan; one of his legal tutors, and later formed a partnership with Judge James B. Swing, which continued for two years, and was terminated by his election to the Probate Judgeship of Hamilton county in the fall of 1890. He has been twice re-elected. Judge Ferris is president of the Ohio State Probate Judges' Association, having been honored with said office five consecutive times. He has always been identified with educational interests throughout the county and state, and at present is 'a trustee of Denison University.

Judge Ferris has always taken a lively interest in politics. Having been chairman of the Republican Committee of Hamilton county, and delegate to the Republican National Convention that nominated Benjamin Harrison for the presidency in 1888.

Judge Ferris was married in 1884 to Miss Fannie McArthur, a Cincinnati lady, and, with their two children, they reside on Walnut Hills.



HON. DAVID DAVIS, CINCINNATI, O.

Common Pleas Judge.

David Davis was born in Gallia county, Ohio, and is 45 years old. Attended the Gallia Academy for three years, and National Normal School, Lebanon, O., one year. Commenced reading law March 13, 1875, under the instruction of Judge James Tripp, Jackson, O., and was admitted to the bar in September, 1876. Commenced practicing at Jack-

son, O., spring of 1877 and made progress rapidly, confining himself to civil practice. August, 1885, removed to Cincinnati, O., and again met with success in his profession. Republican in politics. Has been mayor of Norwood, a pretty and thriving suburb of Cincinnati. Was elected common pleas judge at last election, having nearly 19,000 majority. Resides at Norwood, O.

During the last days of our general assembly, the legislature passed a special act for Sandusky county, providing that all oil taxes collected should go to the various oil producing townships for road improvements. The attorney general recently gave as his opinion that the law would not hold, and the auditor was accordingly directed to distribute the taxes collected from oils, amounting to about \$10,000, in the county funds *pro rata*. There are about seven townships affected, and the trustees of these townships have decided to test the law through all the courts. The test case will be of great interest to all oil producing counties in the state, as affecting subsequent legislation on this line.

Judge Evans of the Franklin common pleas court on Monday of this week laid down a new rule which marks a great advance in the interpretation of the laws relative to mortgages. Not only is the decision of great import to the parties who loan money on mortgages upon real estate, but also to those who have secured immunity from taxation. In brief the judge holds that the assignment of a mortgage must be made a matter of record in the county recorder's office, and that if the assignee of the mortgage fails to have the same recorded he makes the party to whom the mortgage was originally payable, his agent, and his claim holds no priority over innocent persons. The decision is based principally upon the laws of 1888, page 284 (85 O. L. 284) and the case of *Holmes v. Gardner* decided in 50 O. S. 167.

It is now no uncommon thing for women to be admitted to the bar of the courts, both state and federal. Older members of the bar remember how hard it was at first to open the doors of our courts for admission of women, but few women have attained the honor of gaining admission to practice before the United States supreme court. But on Monday of last week that tribunal admitted two women to practice before it. One was Mrs. Alice Minick, who is a graduate of the University of Nebraska law school, and who was admitted to the bar several years ago and has practiced in the courts of that state for some time. The other woman was Miss Caroline H. Pier, who attended the law school of the University of Wisconsin, and graduated with her sister Harriett in 1891, and after her graduation she went into an office, with the intention of perfecting herself in her chosen profession, taking up the branch of admiralty law, locating at Milwaukee. She was admitted to the Wisconsin bar several years ago, but pursued her studies with the view of making herself an able lawyer.

We welcome both these women to the bar of the highest tribunal in the nation, and wish them success.

#### EVASION OF TAXATION.

During the trial of the case of the Tabernacle Baptist Church against John D. Rockefeller, in New York City, recently, the following unctuous tidbit of evidence was dropped by the defendant while on the witness stand:

"Who was the real owner of the lease obtained from St. Mark's Church?"

"I was," he answered.

"But it was held in the name of the church; why was that?"

"The reason for that," replied Mr. Rockefeller, "was to escape taxation. If I had held the lease in my own name the property would have been taxed. If the church had held it, it was exempt from taxation."

He who evades the law is equally culpable with him who violates the law, and such evasions as that of which the defendant makes full confession are tainted with the turpitude that attaches to falsely swearing to a taxable property list.

### ENTRY IN BANKBOOK.

The supreme court of Georgia has lately decided a very interesting question holding that while an entry in a bank book or pass book, purporting to show that the owner of the book has credit in a bank for a specified balance is not conclusive or binding upon the bank, yet, when a banker issued and delivered such a book containing an entry of this kind which was *ob initio* false, and when, after this was done a third person who had seen the book, applied to the banker for information as to the genuineness and accuracy of the apparent credit, at the same time disclosing his reasons for making the inquiry, and the banker, while expressly declining to give in terms the information thus sought, did by concealing the truth, or by other means induce the inquirer to believe the entry in the book was true and correct, and in consequence of that belief to make with the owner of the book a contract by which the inquirer though exercising due care in the premises, was defrauded and suffered a loss, the banker was, within proper limits, liable in damages to the former on account of that loss, if, under the special circumstances of the case, he was under an obligation to communicate to the inquirer the exact truth of the matter; *James v. Crosthwaite*, 25 S. E. Rep. 754.

Judge Smith of the Hamilton circuit court rendered an important opinion regarding the right of a treasurer of a corporation, who is also a director, to recover for services rendered as treasurer. The case was that of *James Dalton v. The Brush Electric Light Co.*, in which the plaintiff sought to recover \$900 as salary for four and one half months' services as treasurer of the defendant company. It appeared that plaintiff was qualified as a director by the placing in his name of one share of stock, upon the back of which he executed a transfer in blank, and returned it to the president of the company, and he was thereupon elected secretary and treasurer. No salary for his services was fixed, and the superior court of Cincinnati instructed the jury to find for the company. This brought before the reviewing court the question whether the fact of plaintiff's

election as treasurer at the time of and during his term of office as a member of the board of directors absolves the company from liability to pay him a reasonable amount as salary for his services as treasurer. To this question Judge Smith in rendering his opinion says: "In the conflict of adjudication, we are of the opinion that the fact that Mr. Dalton was a director of this corporation when he was elected as treasurer thereof and while he served as such, and that he had no express contract with the company at the time of his election, that he was to be paid for his services, would not preclude him from recovering the fair and reasonable value of his services, if they were valuable, and were rendered under such circumstances as showed that it was the intention of both parties that he was to be compensated therefor. And as there was evidence tending to show this, the action of the trial court in directing a verdict for the defendant was erroneous, and for this reason the judgment will be reversed."

### LIEN ON GRAVESTONES.

In the grand old empire state there exists a law of an unprecedented nature, both in that state or any other state in the Union. The law to which this reference is made is chapter 543 on the laws of New York, which law was enacted in 1888, and which gives a lien for the unpaid purchase price of gravestones and monuments, giving the lienholder the power to remove them after they have been put in place. No doubt the knickerbockers of the next century, when some antiquarian resurrects this legal sacrilege, will respond with unction to Hawthorne's dubious toast to the Puritans: "Here's to our ancestors, thank God for them, and doubly thank Him that each century removes us farther from them."

But for nine long years has this law been upon the statute books of that grand state, and it seems no resistance has been made as to its enforcement, in fact it has been a dead letter law until the institution of a suit entitled *Brooks v. Taylor*, just recently decided by the supreme court of that state. The law was held unconstitutional as authorizing the taking

of property without due process of law. The learned counsel for the grave wrecker sought to decry that spirit of humanity which in all ages and conditions has ever regarded a grave as consecrated ground. The learned justice in delivering the opinion of the court, tenderly and pertinently observed:

"The act in question is almost without precedent in the legislative history of the state. It confers upon the lienors the right to go upon the plaintiff's burying plot and dig up and remove the monument and sell it at public auction without the consent of the owner and without instituting legal proceedings of any kind. In removing the monument they may desecrate the graves and disturb the remains of plaintiff's deceased wife and daughter, and the statute in question affords him no protection. The learned counsel for the defendants contended upon the argument that desecrating the graves is merely a sentiment, and that the act permitting it to be done is not against public policy. Conceding that it is a mere matter of sentiment, it is one, however, that has received the sanction and approval of mankind of all ages. Every civilized country regards the resting place of the dead as hallowed ground, and not subject to liens and to be sold upon execution like ordinary property. Courts of equity have always been ready to restrain those who threaten to desecrate the graves of the dead, and to protect the sentiment of natural affection which the surviving kindred and friends entertain for their departed relatives. It is a sentiment that the legislature of this state recognized years ago by passing appropriate laws to preserve and protect the resting-places of the dead."

#### COUNTY CLERKS.

In a decision rendered recently by the United States circuit court of appeals an interesting question was decided regarding the liability of county clerks in this state upon their official bonds for failure to issue a summon upon a precipe.

The case arose in the following way: One Grubbs procured a judgment in the common pleas court of Guernsey county against the B. & O. R. R. Co. for a sum which with interest at the time of pay-

ment amounted to about \$2,231.04. The company filed a petition in error in the circuit court of that county, to which was attached a certified copy of the docket and journal entries in said cause in the common pleas and the original papers as required by law. These papers were delivered to the clerk of the common pleas court an ex officio clerk of the circuit court of that county. With the papers was filed a precipe in due and proper form, directing the said clerk to issue a summons in error to the sheriff of Guernsey county, returnable according to law, directing him to summon the said Grubbs, the defendant in error named in the petition in error, and to notify him of the pendency of the suit, but this duty was disregarded by the clerk, and no summons in error were issued, and at the end of six months after rendition of the judgment below, the cause was dismissed by the circuit court for failure to obtain jurisdiction, and the company was obliged to pay the amount of the judgment below, with interest.

Afterwards the railroad company brought suit in the United States circuit court at Columbus, against the county clerk, upon his official bond, for recovery of damages in the amount of the judgment and interest, on the ground of the clerk's neglect and default. Judge Seaverns heard the case and gave judgment for the clerk. To this, error was prosecuted to the United States circuit court of appeals, and in a decision filed by that court last week, Judges Taft and Lurton held that the clerk was negligent and was therefore responsible under his official bond, and that the measure of damages is not a nominal sum, but the full amount of the loss sustained. Judge Hammonds dissented as to the finding of negligence but not as to the measure of damages.

The clerk set up as one of the defenses that there was no precipe filed, but it was among the papers. He simply did not find it, and probably did not even look for it. Another defense was that it was the duty of the attorney of the road to supervise the issuing of summons, and that if the clerk was negligent, counsel was also negligent. But as expressed in the opinion of the majority of the court, which was by Judge

Taft, it was held that the failure of the railroad company to stand over the clerk and see that he did his duty, was not negligence on its part, contributing to the subsequent loss; and that it does not lie in the mouth of the clerk to say "Yes, I was negligent; but you ought to have anticipated that I would be negligent and to have watched me in my work and spurred me to my duty." On the contrary under the Ohio law, which is different from that of most states, "it is the clerk's duty" to issue the process to the sheriff, it is the sheriff's duty to serve it, and return it to the clerk; it is the clerk's duty to receive the return, and to record it. The whole machinery is put in motion by the precept of the moving party to the action, but after that the law provides no place for the intervention of the party. We think this elaborate and detailed provision for the machinery of service and return was for the very purpose of relieving the private party who should properly set it in motion from any responsibility as to its due operation, and that thereafter he has the right to rely on the public officers performing his duty secured as it is by his oath and official bond.

### SUPREME COURT OF OHIO.

#### Official Record of Proceedings.

##### General Docket.

TUESDAY, February 16, 1897.

3900. Anna Marx v. Jacob Loo. Error to the circuit court of Wood county. Judgment reversed for reasons stated in Journal entry.

4470. Mary Bush v. Harvey Snyder et al. Error to the circuit court of Wayne county. Judgment affirmed.

4769. I. J. Miller et al. v. William Henry Elder et al. Error to the circuit court of Hamilton county. Judgment affirmed.

5301. Thomas M. Stacey v. The State of Ohio. Error to the circuit court of Stark county. Judgment affirmed.

##### New Cases.

New cases filed in the supreme court since February 10, 1897.

5448. The State of Ohio v. J. Bohn. Error to the circuit court of Cuyahoga county. Theo.

L. Strimple and Clark & Thompson, for plaintiff. Goulder & Holding, for defendant.

5449. Enoch Rank et al., partners, v. Joseph B. Akriovitch et al. Error to the circuit court of Jefferson county. John M. Cook, for plaintiff. John M. Cook and P. P. Lewis, for defendants.

5450. Joseph R. Megrew et al. v. William Lennox. Error to the circuit court of Pike county. W. B. Richie and W. H. Leete, for plaintiffs. F. E. Dougherty, for defendant.

5451. John H. Doyle v. Charles West. Error to the circuit court of Lucas county. Doyle & Lewis, for plaintiff. Waite & Snider, for defendant.

5452. Charles S. Ashley v. The City of Toledo. Error to the circuit court of Lucas county. Clayton W. Everett, for plaintiff.

5453. The State of Ohio ex rel., underwriters of American Lloyds, v. William S. Mathews, Supt. of Ins. Mandamus. J. K. Richards, for plaintiff.

5454. George W. Collett, Treas., v. The Springfield Savings Society, etc. Error to the circuit court of Clark county. Chase Stewart, W. A. Scott and N. E. Warwick, for plaintiff.

5455. Martha E. Cole v. Anna A. Gierhart. Error to the circuit court of Scioto county. T. C. Anderson, for plaintiff. N. W. Evans and D. Livingston, for defendant.

5456. James Richardson et al. v. Anna A. Gierhart. Error to the circuit court of Scioto county. T. C. Anderson and W. B. Richardson, for plaintiff. N. W. Evans and D. Livingston, for defendant.

5457. The State of Ohio ex rel. W. A. Babcock v. The Board of Commissioners of Cuyahoga county. Error to the circuit court of Cuyahoga county. William A. Babcock, for plaintiff. P. H. Kaiser, for defendant.

5458. Robert Colvin v. The Mt. Hope College. Error to the circuit court of Columbiana county. J. M. Dickinson, for plaintiff. Potts & Moore and L. L. Farr, for defendant.

5459. The Guernsey National Bank of Cambridge v. The Ohio Live Stock Co. Error to the circuit court of Guernsey county. Robert T. Scott, for plaintiff. Campbell & Rosemond, for defendant.

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Rolin W. Sadler, of Akron, regarded as the brightest lawyer at the Summit county bar, died Monday of this week as the result of an injury received in a runaway Friday of last week, from which time he never regained consciousness. Death resulted from a fracture at the base of the skull. Mr. Sadler was born at Centerville Michigan, July 7, 1856. He graduated from Mount Union College in 1874, and was admitted to the bar in 1878. He was married in 1880 to Mrs. Carrie M. Comstock, of Bedford, and leaves a widow and two children.

The first division of the supreme court of Missouri has rendered a decision, the effect of which is to open to women nearly all the elective county and state offices in the state of Missouri. The case arose out of the election of a woman to the office of clerk of a county court, but the incumbent refused to surrender the office, on the ground that women were ineligible. The court held that a woman is eligible to hold any elective office in the state which is not specifically barred against her by statute.

A decision rendered by Judge Hammond, of the United States court at Toledo, Friday, of last week, will undoubtedly prove to be of great interest to banks and investors in bank stocks. The case was that of W. C. Niblack, receiver of the Columbia National Bank, of Chicago, against F. B. Case, for \$17,000, due on stockholder's liability, called for by an order issued by comptroller of the currency, Eckles, for enforcement of stockholder's liability, to the extent of \$15 on each share. The court decided that Case was liable and gave judgment for \$20,183, which includes interest. The important point in the decision being that the order of the comptroller of the currency is conclusive evidence of the indebtedness of the stockholders. This settles the procedure in making stock assessments in favor of national bank creditors in Ohio. The procedure has always been indefinite, but now there is no doubt regarding this liability.

**GAYLORD v. HUBBARD.**

In the case of *Gaylord v. Hubbard*, published last week in our advance sheets of supreme court decisions, the final decision of the supreme court was made to read "Judgment affirmed." By some error in the preparation of the case for publication it was given out "Judgment affirmed," when it should have been "Judgment reversed."

**DEATH OF JUDGE SCRIBNER.**

Shortly after 4 o'clock, Tuesday afternoon, Judge Charles H. Scribner, of Toledo, one of the most prominent citizens of Ohio, died at his family residence, 423 Islington street, after a long illness. The direct cause of his death is ascribed to heart trouble. He has been wavering in the scales of life and death since last autumn, having been confined to his home since August, and from time to time reports would go out that Judge Scribner was very low and that his demise was near at hand. With wonderful vitality, with which he was possessed he would rally, and be able to be up and around the house, although not recovering sufficiently to leave his home, but shortly after noon Tuesday he was noticed failing rapidly, soon sinking into unconsciousness, from which he never rallied.

Judge Scribner was born on October 20, 1826, near Norwalk, Conn., and was of English descent. While still a child he removed with his parents to Newark, N. J., and it was in the common schools of that city that he acquired the rudiments of his education. In 1838 his parents removed to the village of Homer, in Licking county, and there in the district schools his education was continued. When eighteen years of age he was an apprentice to the trade of saddler and harnessmaker, but he had marked out a different career for himself, and worked industriously to fit himself for it. He worked hard at his trade during the day, and at night worked just as hard studying law. His preceptor was Edward Connelly, Esq., of Homer.

In 1848 he was admitted to the bar in Mt. Vernon, Knox county, and shortly

after having been admitted he formed a partnership with Henry B. Curtis, which lasted for 20 years, and in that time Judge Scribner had won a commanding place in the country round about for his profound legal ability and forensic eloquence. And during those years he found time in his busy life to produce a treatise on "The Law of Dower," which immediately was accorded and still maintains the leading position as a text book on that subject. The first volume of this valuable work appeared in 1864, and the second in 1867.

In 1867 Judge Scribner was a member of the state senate, and was chairman of the committee that prepared the municipal code, and also prepared the present criminal code. He was also a member of the constitutional convention of 1873, and while serving was nominated for judge of the supreme court on the Democratic ticket, but was, however, defeated. In November, 1887, he was elevated to the circuit bench judgeship, for the circuit consisting of the counties of Huron, Erie, Ottawa, Sandusky, Lucas, Wood, Fulton, Henry, Defiance, and Williams. When Judge Scribner moved to the city of Toledo, he formed a partnership with Hon. Frank Hurd, the firm name being Scribner & Hurd. On the admission of Mr. Harvey Scribner to the bar in 1871, the firm name became Scribner, Hurd & Scribner, which it remained until the election of Judge Scribner to the circuit bench.

Judge Scribner was married October 20, 1847, to Miss Mary E. Morehouse, of Newark, N. J., and at the time of his death leaves a wife and five children surviving him.

**PRIZE-FIGHTS.**

[Clark Common Pleas Court, 1897.]

**THE STATE OF OHIO v. EARL MOORE**

The supreme court in *Seville v. The State*, 49 Ohio State Reports, page 117, having refrained from making any but a general definition of the term "prize-fight," which leaves the question not entirely free from difficulty

to *nisi prius* courts in application to specific cases, the following excerpt of a charge to a jury, is, by request, published:

CHARGE TO JURY, DELIVERED BY JUDGE  
MILLER.

The term prize-fight has been defined to be a "pugilistic encounter or boxing match for prize or wager," but as the statutes of Ohio have prohibited this and other offenses of a somewhat like character in the same chapter of said statutes, it is proper in order to mark the distinction between this and said other offenses, to give to you a more specific definition; and therefore, I charge you that when by previous agreement between persons, they enter into a contest for supremacy by the administration of blows with the fist upon the bodies of each other, which contest by the agreement shall continue until one of them becomes a victor over the other, and when by such agreement there is to be given to the victor in such contest money or other thing of value, whether such money or other thing is the result of a wager between themselves, or a reward contributed by others, or the proceeds of door or gate receipts, we have all the elements of a prize-fight. It will be observed by this definition that no account is made of the question as to whether such contest is had with naked or gloved hand or fist; neither in order to constitute it a prize-fight is it essential that it should be with the naked hand or fist; but the fact, if it should so appear from the evidence in this case, that such contest was had with gloved hands, as also the kind, size, weight and other characteristics of the gloves so used, may be looked to in connection with the other evidence in the case bearing upon such question, in determining whether such contest was a prize-fight or merely a sparring or boxing exhibition without prize or reward to the victor, in which latter case, if you so find, the defendant should be acquitted; but I charge you further in this connection that if taking such evidence as to said contest having been had with gloved hands, and the kind, size, weight and other characteristics of said gloves so used, in connection with the other evidence in the case, you are satisfied beyond a reasonable doubt under the specific definition I have given you as to

the meaning of the phrase prize-fight, that said contest was a prize fight, you must so find notwithstanding it may have been with gloved hands. I charge you further as to the previous agreement spoken of in said specific definition of the term or phrase prize-fight, that it is not necessary that said agreement to enter into said contest should have been made at any particular length of time previous to the actual contest, only that it should have been made and understood between the parties at some time at least, however brief, before such contest began.

I charge you further that although such agreement to contest for a prize or wager, as I have before defined to you, must have been an agreement to contest until one of the contestants obtained a victory over the other, it is not necessary that such contest should have been maintained until such victory was actually obtained, or to use an ordinary phrase, that it should have been "fought to a finish," nor that the prize, wager or reward aforesaid should have been actually paid to either of the contestants, for if the prize-fight, if you so find under the evidence and my instructions, was once actually begun, that offense was complete, although its final consummation may have been prevented from any cause. I charge you further in reference to the agreement of which I have spoken in the definition aforesaid that it is not necessary that such agreement should appear to have been made in any form of words, or in writing. Consent is agreement, and it is sufficient if the defendant was consenting to the combat either in words or by gestures. An agreement may be inferred from the conduct of the parties and other circumstances, so you may look as well to the conduct of the parties, not only before but during the continuance of the contest, and to all the other facts and circumstances proven upon the trial to determine what agreement, if any, existed between the defendant and his co-defendant with reference to such contest previous to the beginning thereof. I am asked to charge you that if an agreement to enter upon said contest had been made by their seconds or other parties on their behalf, said defendants would have been

bound by it, and I so charge you with this essential condition that if so made, such agreement and its terms should have been known by said defendants before said contest began, for it is not to be presumed that the agreement of aiders and abettors of a prize-fight will bind the principals without their knowledge of the terms of such agreement.

#### LEGISLATION OF OUR SISTER STATES.

##### Wise and Otherwise.

After a brief discussion, the Kansas legislature has decided to permit women to wear bloomers and corsets.

A bill has been introduced in the lower house of the Missouri legislature, making it a penalty, punishable by a penitentiary sentence of five years, for a married man to be found guilty of matrimonial infidelity, under any circumstances whatever.

The South Dakota senate has passed an anti-trust bill.

A bill has been introduced, by a Populist member of the Kansas senate, which provides for letting out all county offices to the lowest bidder. This looks very much like a bill to foster bribery.

The Avery fellow-servant bill, making railroad companies responsible for accidents resulting from carelessness of employees, has passed the Missouri senate and house, and has been sent to the governor for his signature, with every prospect of becoming a law.

A bill of great interest to bank depositors, has been introduced in the North Dakota senate, which provides that every state bank shall deposit in the state treasury, a sum equal to one half of one per cent. of the amount of deposits in the bank. This shall constitute a trust fund to be used only when a bank shall fail, when, in such case, the receiver of the bank shall be empowered to draw upon the state treasury for a sum sufficient to pay all depositors in full, if there is a sufficient amount in the fund. A law of this kind should be passed in every state.

A bill prohibiting the wearing of high hats by ladies in public gatherings, where an admission is charged, is likely to pass both houses of the Indiana legislature.

Representative Hood, of the Missouri legislature, has introduced a bill forbidding railway conductors and brakemen from flirting with female passengers. Violations of this law will be punishable by a fine of \$25, payable by the corporation owning the railroad, they being held responsible for its enforcement.

A bill before the Missouri legislature provides for the utilizing of idle convicts in reclaiming swamp lands in the state.

A bill before the legislature of California, provides that two photographs shall be taken, at public expense, of every voter registered; one set to be placed in a book in alphabetical order of names, and the other in another book, arranged by streets and numbers of rooms in houses. It is provided that the expense of taking the two photographs shall not exceed five cents, and the purpose is to prevent repeating and fraudulent personation at elections.

The legislature of Tennessee has passed an act making lobbying a felony, punishable by, from two to five years imprisonment.

The Arkansas senate has passed a bill providing that hereafter none but qualified electors shall hold any position within the gift of the Arkansas legislature. It is said that the army of females who besiege the members of the legislature, at every session, to secure their vote for a clerkship, is responsible for the action of the senate.

A bill has been introduced in the Minnesota legislature, entitled, "An act to prevent the fostering of crime and morbid sentimentality." The bill provides that any person who shall give, or offer to give, or send flowers, or any other token of sympathy or admiration to a person under arrest, charged with a crime amounting to a felony; or is under, or awaiting sentence for a crime amounting to a felony, shall, unless such person stands in the relation of husband, wife, child, parent, brother or sister of such criminal accused, or is an ordained minister of the gospel, be guilty of a misdemeanor, and on conviction thereof, be punished by imprisonment in the county jail for a term of not less than fifteen, nor more than ninety days, or by a fine of not less than \$25 nor more than \$100.

The Arkansas house, by a unanimous

vote, has passed an anti-trust bill, which prohibits the formation of any trust or combine in the state, and prescribes a fine of not less than \$500 nor more than \$2,000, and a sentence of from one to ten years, for the violation of the provisions of this act.

The Washington senate has passed a bill providing that all indebtedness shall be paid in either gold or silver money.

A bill to abolish the whipping post and pillory has been introduced into the Delaware state senate.

Among the bills recommended for passage in the Indiana house, has been one making it unlawful to play football in that state.

A member of the Pennsylvania legislature has proposed a bill by which the custom of "treating" is to be declared illegal, and a penalty put upon the offender.

The lower house of the Tennessee legislature has passed a bill providing that all contracts hereafter made in that state, which stipulate for payment in gold, shall be void to the extent that they stipulate for such payment, and that all such contracts may be lawfully discharged in any kind of legal tender, whether gold, silver or paper money. The bill is now pending in the senate of that state.

The legislature of Indiana has before it a bill which provides a tax of \$10 per year on every man wearing chin whiskers or "burnsides," and a lighter tax on goatees. Mustaches are exempt.

#### ENDOWMENT POLICIES.

COLUMBUS, O., FEBRUARY 20.

*Hon. W. S. Matthews, Superintendent of Insurance:*

DEAR SIR: This department has the honor to receive a communication from you under date of Feb. 19, 1897, asking for an opinion in writing as to whether, under the provisions of section 3630 and the supplementary section thereto, providing for the organization and regulation of associations to do business of life insurance on the assessment

plan, such associations can issue certificates of insurance promising to pay in money at some fixed time during the life of the insured the amount stipulated in the face of the policy or certificate.

In other words, can such associations legally issue endowment policies?

Section 3630, as amended March 31, 1891, provides that a company or association may be organized to transact the business of life or accident, or life and accident insurance on the endowment plan, for the purpose of mutual protection and relief of its members, and the payment of stipulated sums of money to the families, heirs, executors administrations or assigns of the deceased members of such company or association, as the members may direct, in such manner as may be provided in the by-laws, and may receive money either by voluntary donation or contribution, or collect the same by assessment of its members, and may accumulate, invest, distribute and appropriate the same in such manner as it may deem proper; but all accumulations and accretions thereof shall be held and used as the property of the members and in the interest of the members.

This is an amendment of the act passed Feb. 3, 1875, which amended the act of April 20, 1872, and the act of 1872 was a supplementary act to the general statute authorizing the incorporation of companies in the state of Ohio.

Section 3630a, passed 77 O. L., page 178, provides a list of questions to be answered in the annual statements to be furnished your department, from 17 to 25, inclusive, that recognizes that there were in existence and may yet be in existence, life insurance companies organized under the general statute, 3236, 3238, that included clearly the power to do endowment insurance.

Sections 3630b and 3630c refer to such corporations, companies or associations that were in existence, and may have been organized under 3236, 3238 or any other law of the state, for the purpose of doing business under 3630, which section also refers to a class of companies already existing capable of issuing endowment policies, expressly providing for the payment to members of any sum of money during life under such cer-

tificate, or guaranteeing a fixed amount at death. But in the amendment again of 3630e in 1891, the legislature, referring to companies and associations doing a combination life and accident business on assessment plans, uses this language.

"Such corporation, company or association shall be authorized to transact in this state the business of life or accident, or life and accident insurance on the assessment plan, for the purpose of mutual protection and relief to its members, and for the payment of stipulated sums of money to the families, heirs, executors, administrators or assigns of the deceased members of such corporations"

Using the same language as is used in the amendment of 1891 of the parent section 3630. Section 3630, and that portion of 3630e just referred to, refers to the organization of companies to do the insurance in those sections described, from and after the date of such passage. Section 3630a and 3630c are remedial and regulative of companies not only to be organized, but already in existence under repealed laws, and in existence under the general statutes for the purpose of incorporation. Bearing in mind these distinctions, and reading into the words in 3630 their natural meaning with proper limitations, I find:

That inasmuch as the double business of life and accident, and life or accident, is provided for in one section; that the subsequent qualifying words should be applied to the respective class of insurance that they would most naturally define. When the expression is used "for the purpose of mutual protection and relief of its members," following the term "accident insurance," it is most natural to apply the term "protection and relief" to that class of insurance. No relief or protection can be afforded a dead man. A deceased person is no longer a member. Death cancels the contract so far as the mutuality of the contract exists. The act does not speak of the dead man as any longer being a member. Therefore the terms "protection and relief of its members" must refer to the living members. This clause is immediately followed up by the life provision, by adding "and for the payment or stipulated sums of money to the families, heirs, executors,

administrators or assigns of the deceased members of such company."

There will be no families, heirs, executors, administrators or assigns of a deceased member until the death of the member. So that there is nothing in this clause that authorizes investment policies or endowment policies to pay a "stipulated sum of money" to the member, or anyone on the happening of any other event than death. And the subsequent authority providing bylaws cannot rise higher than its source, namely the powers granted to the association.

Thus we may see that the term "life insurance" not being modified by any qualifying words such as "investment life insurance" or "endowment life insurance," and the subsequent limiting words not indicating they are to be taken in any other than their natural sense, I do not see how the subsequent clauses referring to accumulations, distributions and investments can be construed to mean endowment or investment insurance. But such accumulations, investments and distributions and appropriations must come within the original powers, namely for the mutual protection and relief of its members.

I do not understand that the term "protection and relief" are terms to be applied to purely financial distress. But in all the textbooks they seem to be used in connection with sick benefits or physical infirmities coming upon the member.

Associated words explain and limit each other. The term "protection" in its ordinary definition would mean the act of protecting from injury or annoyance or protection from loss. The ordinary definition of "relief" is the removal of any evil, or of anything oppressive or burdensome. These terms being associated in this section with accident insurance, can consistently be applied and limited to that class of insurance. The connection would not warrant reading into the two words "protection and relief" the broader definition of "investment or endowment insurance."

The subsequent language in the section "distribute and appropriate," must be construed in harmony with the limitations of "protection and relief." Section 3630i provides for companies that

may issue sick benefit policies, with limitations that seem to exclude their being included under section 3630.

The term "appropriate" as used in section 3630 should be confined to the use of such accumulations in the payment of expenses. And perhaps actual losses occurring under either set of policies. The term "distribute" must be taken in connection with contingent assessments. And the company would have no power under section 3630 to guarantee to distribute an absolute sum to a living member. The court held in 47 O. S. 167 that, "Corporations organized under section 3630, which do not comply with the laws regulating mutual life insurance companies, have no power to issue policies guaranteeing any fixed amount to be paid at the death of a member, except such fixed amount shall be conditioned upon the same being realized from the assessments made on members to meet it. But such corporations have to comply with the mutual life insurance laws before they are authorized to issue endowment policies."

So that it seems to me clear that the term "distribute" cannot so far nullify all the preceding language of this section as to open the door for endowment or investment policies.

So far as this interpretation would conflict with sections 3630 *a*, *b* and *c* by assuming that these sections by implication when speaking of endowment policies, refer to policies issued under 3630 and not to companies incorporated under the general articles of incorporation as they were prior to 1872. I would then apply the rule that where two statutes on the same subject or on related subjects are apparently in conflict with each other, are to be reconciled by construction so far as it may be possible on any fair hypothesis. Validity and effect should be given to both without destroying the limitations and meaning of the latest act. Again, of two constructions, the words of the latest law must control.

It is my conclusion and opinion, therefore, that section 3630 as now amended, does not authorize an assessment association organized thereunder and not complying with the laws regu-

lating mutual life insurance companies, to issue investment or endowment certificates.

Respectfully submitted.

F. S. MONNETT,  
*Attorney-General of Ohio.*

## SUPREME COURT OF OHIO.

### Official Record of Proceedings.

TUESDAY, February 23, 1897.

#### General Docket.

3497. Mary R. English et al. v. William Monypeny. Error to the circuit court of Franklin county. Judgment affirmed. SHAUCK, J., not sitting.

3705. The Pennsylvania Company v. Stephen B. Sturges et al. Error to the circuit court of Richland county. Judgment affirmed. The case was orally argued to the first division but was considered by the whole court.

4124. The Pennsylvania Company v. Stephen B. Sturges et al. Error to the circuit court of Richland county. Judgment affirmed. The case was orally argued to the first division but was considered by the whole court. MINSHALL, J., dissents.

4172. John D. Ewing, Admr., v. Joseph Baker. Error to the circuit court of Knox county. Judgment affirmed.

4174. C. A. Beilharz, Admr., v. The Columbus, Shawnee and Hocking Ry. Co. Error to the circuit court of Franklin county. Judgment affirmed for the reason that one ground of reversal was that the verdict was against the weight of the evidence. Other questions not passed upon.

4176. John Lally, Admr., v. The Pennsylvania Company. Error to the circuit court of Mahoning county. Judgment affirmed for the reason that one ground of reversal was that the verdict was against the weight of the evidence. Other questions not passed upon.

4227. The Sun Mutual Ins. Co. v. John A. Hock. Error to the circuit court of Hamilton county. Judgment affirmed without passing upon the effect of the evidence respecting the alleged notice by telephone.

4292. Jefferson C. Crossland v. The City of Zanesville et al. Error to the circuit court of Muskingum county. Judgment of the circuit court reversed and that of the common pleas affirmed.

4618. A. G. Hutchinson v. Willard C. Cole. Error to the circuit court of Cuyahoga county. Dismissed by consent at costs of plaintiff in error.

4678. The Baltimore and Ohio R. R. Co. v. Robert W. Scott, an infant. Error to the circuit court of Guernsey county. Judgment affirmed on the authority of *Roberts v. Mason*, 10 Ohio St., 277, and *A. & G. W. Ry. Co. v. Dunn*, 19 Ohio St., 162.

5392. The State of Ohio ex rel. The Prudential Ins. Co. v. Charles Evans, Judge, etc. Error to the circuit court of Hamilton county. Dismissed by consent at costs of relator.

#### Motion Docket.

2859. The Board of Commissioners of Wyandot county v. The State of Ohio ex rel. Motion by plaintiff for stay of execution in cause No. 5437 on the general docket. Motion allowed. Bond for stay of execution in sum of \$100 with surety to be approved by the clerk of court of common pleas of Wyandot county.

2864. The C., A. & C. Ry. Co. v. Frank Boydston, Admr. Motion by defendant to advance cause No. 5299 on the general docket. Motion granted. Briefs to be filed within rule.

2865. J. J. Miller et al. v. E. W. Kittredge. Motion by defendant for oral argument in cause No. 5215 on the general docket. Motion granted.

2866. Grant Garnett v. The Standard Life & Accident Ins. Co. Motion by plaintiff to dispense with printing record and to advance cause No. 5446, on the general docket. Motion granted and cause advanced. Briefs to be filed within rule.

2867. James Reed et al. v. The state of Ohio ex rel. Thomas J. McDermott. Motion by plaintiffs for oral argument in cause No. 5336 on the general docket. Motion allowed, cause set for oral argument on March 3, 1897.

2868. The L. S. & M. S. Ry. Co. v. James J. Kirby, Admr. Motion by defendant to advance cause No. 5116, on the general docket. Motion allowed. Briefs to be filed within rule.

2869. Claribel Ives v. Margaret C. McNicoll. Motion by defendant to advance cause No. 5367, on the general docket. Motion overruled.

2870. George W. Collett, Treas. v. The Springfield Savings Society. Motion by plaintiff to

dispense with printing the full number of printed copies of record in cause No. 5454, on the general docket. Motion allowed.

#### New Cases.

New cases filed in the Supreme Court of Ohio since February 17, 1897.

5460. Henry C. Herbig, Admr. v. Phoebe J. Bell et al. Error to the circuit court of Coshocton county. S. M. Compton and S. H. Nicholas, for plaintiff. Voorhess & Voorhess, for defendant.

5461. Charles M. Yocum, Admr. v. J. M. Scott et al. surviving partner, etc. Error to the circuit court of Wayne county. Rouch & Yocum, for plaintiff. Benj. Eason and A. D. Metz, for defendants.

5462. George Edel v. David A. Arter et al. Error to the circuit court of Stark county. Myer & Piero, for plaintiff. Miller & Pomerene, for defendant.

5463. Robert Cummings, Guard. v. The City of Toledo. Error to the circuit court of Lucas county. Cummings & Lott, for plaintiff. C. F. Watts, for defendant.

5464. Arthur J. Moxham v. Louie M. Oakes. Error to the circuit court of Lorain county. E. G. Johnson and Squire, Saunders & Dempsey, for plaintiff. P. H. Boynton for defendant.

5465. The Cambridge & Elyria Coal Co. v. Harriet E. Loomis. Error to the circuit court of Lorain county. E. G. Johnson, for plaintiff. H. E. Loomis, for defendant.

5466. The Gordon Caskett Co. et al. v. Daniel B. Walborn et al. etc. Error to the circuit court of Wyandot county. Carrey & Parker, for plaintiffs. D. D. Hare and W. R. Hare, for defendants.

5467. Laura Kellar v. The Mutual Benefit Life Ins. Co. Error to the circuit court of Richland county. J. C. Laser, for plaintiff. Bell, Brinkerhoff & Manget, for defendant.

5468. The American Accident Co. v. Elizabeth Card, Admx. Error to the circuit court of Cuyahoga county. Williamson & Cushing, for plaintiff. John O. Winship, for defendant.

# Ohio Legal News.

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## THE FOREMOST OHIO LAW PAPER.

*The growth of this paper during 1896 has been so marked that we confidently assert that it now has a greater circulation than any other Ohio law paper. It also contains so much more legal matter that we are justified in claiming it to be the leading paper in its class.*

The members of the bar at Toledo, met at the court house Monday of this week, and endorsed Hon. J. Kent Hamilton, of Toledo for appointment to fill the vacancy on the circuit bench, caused by the death of Hon. Charles H. Scribner.

The North Carolina supreme court has lately decided that an action for damages will lie in favor of a husband against a druggist, who, in violation of the husband's express orders, has sold laudanum to his wife, in consequence of which she has become a victim of the opium habit.

The movement recently inaugurated by the New York State Bar Association, to secure the registration of all persons practicing law within the state of New York, has taken form in the introduction of a bill for that purpose in the legislature.

The bill provides that every person duly licensed and admitted to practice as an attorney-at-law, or as an attorney and counselor-at-law, or of record of that state, must before January 1, 1898, subscribe and take an oath or affirmation stating that he is a citizen of the United States, that he was duly admitted to practice, and that he took the constitutional oath of office and subscribed the roll or book of attorneys.

In reply to a correspondent's inquiry regarding the possibility of making a success at law without taking a course at a law school, Ex-President Harrison says: "Whatever success I have attained at the bar was attained without a course at a law school. I studied law in the office of a leading firm in Cincinnati. That a course of lectures by able professors upon the law, as upon any other subject, is valuable to the student, I do not doubt. But these professors derive their information from books, to which the student has access, and he may grub knowledge for himself if he has the requisite pluck and industry. The observation and casual instruction which a student gets in a law office are of the first value to a practitioner."

John R. Hughes, of Columbus, who has been sued by Patrick McGraw for \$10,000 damages, alleged to have been suffered in an accident in an elevator in Hughes' building, has filed an action in the Franklin common pleas court, compelling McGraw to submit to an examination by surgeons, with the aid of the Roetgen rays, to ascertain whether he suffered the fracture of bones in the accident, which he claims to have suffered.

This is the first time in the history of courts that such an order has been asked for and its disposition will be awaited with a great deal of interest as thereby this court will establish a precedent regarding the use of the Roetgen rays in the trial of cases arising from accidents.

A decision rendered by the supreme court at the United States, last January, in the case of *Gulf C. & S. F. Ry. Co. v. Ellis*, and reported in 17 Sup. Ct. R., 255, is quite important because of the policy of general application which it lays down. It was held that a statute of Texas providing that railroad companies failing to pay claims less than \$50 for labor 'damages' overcharges or freight, or for stock killed, within thirty days after presentation thereof, shall be liable for an attorney's fees not exceeding \$10, is void, as depriving such companies of the equal protection of the law. Attention is called to the possible scope of the decision as a precedent in the dissenting opinion by Justice Gray, concurred in by the Chief Justice Fuller and Justice White. The dissenting justices found their action upon the consideration that costs in civil actions are the creatures of statute and that more or less discretionary and even arbitrary authority has generally been conceded to legislatures in the imposition of costs, although the results have been discriminating as to different litigants. The prevailing opinion proceeds upon the ground that under the Fourteenth amendment to the Federal Constitution. "A state has no more power to deny to corporations the equal protection of the law than it has to individual citizens," citing many previous authorities. The radical equality guaranteed to corporations under much amendment may be inferred from reading the opinion of Justice Brewer.

A peculiar state of facts has come to light in Oklohoma Territory regarding the law making it a crime for officers of banks to receive deposits when the banks are in a failing condition. The law is null and void because it overpassed the lower house of the legislature, or at least does not appear on the journal of the house as having passed, although it was signed by the president of the senate and speaker of the house and by the governor. The law has been on the statute books since the meeting of Oklohoma's first legislature, and as a result many bankers have been convicted under it and there are now fifty or more outstanding indictments in the territory against various bankers for an alleged violation of the law.

Attorney general Monnett has been notified by the attorneys of the express companies that they intend to make an application for a rehearing of the Nichols excise law cases, recently decided in favor of the state by the United States supreme court. The copy of the petition which will be filed in the United States supreme court asking for a rehearing gives, among other grounds, the following:

"1. The total insufficiency of the argument offered by the counsel for the appellants due to a failure on their part to anticipate the grounds which really led to the decision of the court.

"2. The extreme importance and far-reaching effect of the decision which has been announced as bearing upon some of the most fundamental principles of constitutional law."

In the decision rendered the court decided for the state by only a majority of one.

In the case of *Hallyburton v. Burke County Fair Association*, decided by the supreme court of North Carolina, recently, and reported in 26 S. E. R. 114, it was held that the owner of a horse who enters him for a race at a fair, in charge of an expert rider, without knowing that the horse is unruly, is not liable for injuries to a visitor at the fair, standing near the railing around the track, by the horse bolting the track and breaking

through the railing and running over him, where it appeared that the visitor could have seen the race from the safe and suitable places provided for the purpose. It was further held that the fair association was not liable, it appearing, as aforesaid, that suitable places had been provided from which spectators might witness the race, and furthermore that plaintiff had been warned by an officer in charge of the fair grounds to leave the place where he was standing as being unsafe.

#### SHEDDING TEARS.

The supreme court of Tennessee recently passed upon the novel question regarding the right of counsel during the delivery of their argument to the jury, to shed tears before them. The question was raised in the case of *Ferguson v. Moon*, which was a case for breach of promise and seduction. It had been assigned as error that counsel for plaintiff in his closing argument, and when in the midst of a very eloquent and impassioned appeal to the jury "shed tears and thus unduly excited the passions and sympathies of the jury in favor of the plaintiff, and greatly prejudiced them against defendant." The court confesses itself unable after diligent search, to find any direct authority on the point, the conduct of counsel in presenting their cases to juries being a matter which must be necessarily left largely to the ethics of the profession and the discretion of the trial judge. The court in concluding its opinion says!

"No castiron rule should be laid down. To do so would result that in many cases clients would be deprived of the privilege of being heard at all by counsel. Tears have always been considered legitimate arguments before the jury and we know of no power or jurisdiction in the trial judge to check them. It would appear to be one of the natural rights of counsel which no statute or constitution could take away. It is certainly a matter of the highest personal privilege. Indeed if counsel have tears at command, it may be seriously questioned whether it is not his professional

duty to shed them whenever proper occasion arises, and the trial judge would not feel constrained to interfere unless they are indulged in to such excess as to impede, embarrass, or delay the business before the court. In this case the trial judge was not asked to check the tears and it was, we think, a very proper occasion for their use, and we cannot reverse for this reason."

#### EXTRA COMPENSATION OF EXECUTORS.

Judge Ferris of the Hamilton probate court, decided a case of great importance, in which were involved the questions of extra compensation to executors, when and for what it will be allowed, together with contests over wills and the payment of counsel fees. Following is an abstract of the opinion rendered by Judge Ferris:

"On a hearing of exceptions filed to the account of the executor and executrix of the estate of Francis Johnston, deceased, the court held that the executors were entitled to no extra compensation in the administration of the estate, where an unusual amount of time was expended and counsel employed in the matter of differences growing out of a misunderstanding between the executors as such. The court held that the estate was one, a unit; that the management must be considered in the same way, and that therefore the heirs were entitled to an harmonious administration; that if services were made necessary by disagreement between the executors, such services must be paid by the executors themselves individually, and were not a proper charge against the trust estate; that extra compensation is to be charged only where services have been rendered of an unusual and extraordinary character, not connected ordinarily with the management of estates; that the provisions of section 6188 were intended to cover all of the ordinary expenses incident to the closing up of the estate; that the litigation that was made necessary in this matter was not for the benefit of the estate in the main, and therefore no charge whatever would be

allowed to the executors for services rendered by them in this behalf.

"Where litigation was necessary in the interests of the estate, and the personal attention of the executors was required, extra compensation could be charged by the executors and the court would allow a proper amount for such services on the principle of *quantum meruit*.

"As to counsel fees the court held that in the case at bar it was no part of the business of the executors to take part in the litigation growing out of the contest of the will. This was the business of the heirs. The very position of the executors was at stake, and with them it was a matter of no legal concern whether the will was sustained or whether it was set aside. It was the business of those interested in the will to see that it was sustained, and of those who were opposed to it to see that it should be set aside, and therefore the executors were no proper parties in the action and could not charge the trust estate with counsel fees.

"There is in law no provision for extra services to counsel, nor is there found anywhere in the Administration Act the term 'attorney fees,' and the rule that is laid down in section 6357 would seem to be covered by the term 'expenses' as used in section 6188. Whatever services were necessary in the settlement of the estate, requiring the assistance of counsel, would be a proper expense to be allowed by the court. While the case of *Moore v. Thomas*, 52 O. S., determines that this is a personal liability of the executor, yet on a showing that the sum paid was proper in amount, that the service was necessary for the estate and was beneficial to the estate, the court would relieve the executor from personal responsibility, and charge the same against the trust estate."

#### TENDER OF WORN OR MUTILATED COIN.

After more than a century of coinage and coinage laws in the United States, it is surprising to find so little in our statutes and decisions upon the extent to which coin may be worn, battered, or

mutilated without losing its character as lawful money. This subject is investigated in a note to the recent Georgia case of *Atlanta Consolidated St. R. Co. v. Keeny*, 33 L. R. A., 824. Only two cases have been decided as to the obligation to accept such coin when tendered. One is the case just named, in which a battered half dollar, coined in 1824, was held to be a valid tender which a street-car conductor could not lawfully refuse when offered for fare, although he believed it was not genuine and it was in fact a rare coin, thinner than usual and also of a larger disc, besides being lettered and not milled on the edge. As the coin was in fact genuine, any doubts on this point was held immaterial. No claim was made that the coin had been reduced in weight by wear or otherwise. But in the case of *Jersey City & Bergen R. Co. v. Morgan*, 52 N. J. L., 60, the supreme court of New Jersey held that so long as a genuine silver coin is worn only by natural abrasion and is not appreciably diminished in weight, and retains the appearance of a coin duly issued from the mint, it is a legal tender for its original value. This decision was affirmed by the New Jersey court of errors and appeals in 52 N. J. L. 558. A writ of error taken from the supreme court of the United States to review this decision was dismissed for lack of jurisdiction in 160 U. S., 288, 40 L. ed., 430, on the ground that the decision of the state court did not deny any right claimed under Federal law. The New Jersey court sets out the acts of congress on the subject which provide that gold coins of the United States, if reduced in weight more than  $\frac{1}{2}$  of 1 per cent. are current at a proportionately reduced value, but that if the reduction is only  $\frac{1}{2}$  of 1 per cent. after twenty years circulation, or a proportionate reduction for a shorter period, they are current at full value. But these provisions do not apply to silver coins, and they are therefore said to be current at full value so long as they remain lawful money.

Passing plugged coin was considered in *United States v. Lissner*, 12 Fed. Rep., 840 in which the circuit court of the United States held that such coin was counterfeit if some of the silver had been removed by drilling or otherwise and

then replaced by a plug of base metal, but that a plugged coin was not counterfeit if in making the hole which was plugged the silver had been merely crowded out of place without removing any of it. The court refers to the English case of *Queen v. Hermann*, L. R. 4 Q. B. Div. 284, 48 L. J. M. C. 106, 40 L. T. N. S. 263, 27 Week. Rep. 475, in which it was held that a genuine sovereign which had been filed on the edges so as to remove the milling entirely, or almost entirely, and upon which a new and false milling had been made, might be considered a counterfeit coin, under 24 and 25 Vict., chap. 99, section 9, defining the offense of passing counterfeit coin. The effect of the decision in *United States v. Lissner*, *supra*, upon the obligation to take a plugged coin when tendered presents an interesting question. If the right to reject it depends on its being a counterfeit, one to whom a plugged coin is offered will need a ready wit to determine whether a part of the original coin has been removed or merely displaced. *Case and Comment.*

### THE JURY SYSTEM.

#### A Modern Jury; Its Objections and Tendency.

This is a matter of vital importance that ought at least, have a passing consideration in this day and age of practical reformation. Founded on a base as true to the American people as steel to adamant, this germ to the vigorous plant of liberty has been so nurtured and caressed in the hearts to the American people, that to doubt it would be sacrilege; to deny it, a crime. Born as it was in the forgotten past; revered as the handmaid of freedom; and planted in the great bulwarks of civil and religious freedom, it finds its way to the constitution of the United States and all the pillars and supports incident thereto. The finger of pride points unceasingly to the handwriting of our illustrious dead and says to us "The right of trial by jury shall be held inviolate." Born in the atmosphere of a jury trial, we cling to it as an heirloom of power possessed by our forefathers to keep away all evil influences.

Reformation and simplicity have driv-

en mankind today out of the old camp and about the only landmark left to mark the home of "Justice" is the vine-clad vane of "Trial by Jury."

The real ideal jury of yore is no more except in name. The great "common-law schoolmaster", the jury, has nobly performed its part and today if practically utilized can be placed in its sarcophagus alongside the archives of the past. Padded with all the anomalies of both past and present, "The jury" has become a child of politics, a natural development and sequence of other rudimentary forms of trial, until today it is founded on human nature itself. We see it in some phase or other detected in all forms of civilization, and day by day the right of "Trial by Jury" gives way to its successor the arbitrator, arbitration, and an honest judiciary. We thus can readily see that the "Jury Trial" does not owe its existence to any positive statute, but is the natural outgrowth of the ancient ordeals of red hot irons and boiling water practiced by the Anglo Saxon to test the innocence of a party, and has grown insensibly and has become inextricably interwoven with the habits of the people. It was introduced into the assizes of Henry II. in the thirteenth century.

To reform, we do not necessarily need to destroy; however, the imperative duty of the hour demands a reformation of such import consistent with the conditions and natural predilections of the people. Our jury system is everywhere a pantomime of justice and when everybody is ill at ease about its results, when a presiding judge exercises authority to set aside the unanimity of the jury, when the jury-box is filled by men "out of a job," and greatest of all when one man can "hang the jury", it is high time the venerable institution receive the encomiums of earth, pull down its blinds, and close its portals to the universal plan of reformation.

In common parlance a jury is a body of men who are sworn to declare the facts of a case as they are proven from the evidence placed before them.

Trial by jury is guaranteed by the constitution of the United States in all criminal cases, except upon impeachment; and in all suits at common law when the

subject-matter of the controversy exceeds \$20 in value. Jury as used in the constitution, means twelve men, disinterested and impartial, not of a kin nor personal dependents of either of the parties, having their honors within the jurisdictional limits of the court; drawn by and selected by officers free from all bias in favor of or against either party; duly impaneled and sworn to render a true verdict, according to the laws and the evidence. The only change in the above, today, is the selection of jurors by a creature of politics—the Jury Commission, that if it means anything adds stability and power to the jury so long as it is not puffed up and bloated with party evils. As for me *give me the single itinerant judge of vast experience and probity capable of meting out equal justice to all regardless of party or favor.* But since we have the jury system let us prune it of useless growths, strip it of all its verbiage except that of the time-honored JUS, limit the endless expense and burdensome taxation of the people, let the process of simplification reign until the vagaries of common law come up to the standard of undoubted utility, or be cast aside. If we must have the right of "Trial by Jury," would it not be wisdom under the Jury Commission to refer disputed facts to the impartial judgment of a few arbitrators, or a jury, of average understanding and of nearly the same station in life as that of the litigants? Were it otherwise, jurymen are frequently required to officiate in blindness like the appraiser who is sworn to appraise a stock of clothing or hardware when his life has been spent in setting type or following the plow. Consistency is a jewel but it must shine in its own sphere.

As the law exists, judges have no right to decide facts; juries no right to determine law; but on the contrary, juries are to find the facts from the evidence adduced and render a verdict thereon according to the law as given by the judges. This leads us to a consideration of several objections to the present jury system. How frequently do we find juries bring in verdicts that are unanimous and in accordance with the law and the facts as found; and how frequently are such verdicts set aside by

the courts as being contrary to law and contrary to the evidence, thus placing the full power of the law, in spite of the time-honored jury system, at the discretion of the court. Juries then become the mouthpiece or echo of the court, whose displeasure they dare not incur. Where, oh, where is that indispensable right of "Trial by Jury," when it merges into the power of one man? Has a jury no conscience to justify a true verdict? The unanimity of the jury's verdict should be sacredly kept, regardless of party or favorite politically.

Another difficulty we all can see is the obstinacy of a single juror who hangs the jury. How aggravating such practice in small civil cases on questions of mere damages to have verdicts prevented and the parties and the public put to excessive expense. How inconsistent and unjust is such practice today. Skilled practitioners challenge vacancies, and, if a doubtful case, fill up the panel with some paid talesman who is ready to have a mind of his own that must control the sanctity of the verdict at the price of vigilance, his *per diem*. This rule of challenge as referred to should be most stringently drawn, to be in complete accord with the spirit and progress of our age.

Like all human institutions, I think the jury system should give way to a better administration of justice. The necessary fruits of the unanimity of a verdict are *frequent hangings and disagreements of juries*. These are just complaints against it, and should either be remedied by changing the rule in civil cases materially, or by doing away with the civil cases entirely. Hence I think and conclude that private matters ought to be settled by the *two-thirds* vote of the jury for one or the other. This will directly facilitate the disposition of cases on the court dockets, cleanse the stream of justice from all impurities, and give us a wholesome system of jurisprudence. Lessen the burdens of the supreme court, now, buried beneath the maelstrom of such grave questions of moment, and enable justice to be more speedily granted, by destroying the usage of mere forms of law that tend to strangle and subvert the true spirit of the jury system.

In criminal law the jury system is consistent with conditions, as the accused should have the full benefit of the doubt at all times. There is a growing necessity for the right of trial by jury to extend before the court of a justice of the peace; for such court to have final jurisdiction in all cases of misdemeanors; and for a great reformation with that *ex parte* tribunal—the *grand jury*. In all criminal cases the grand jury is the medium of accusation, and is of no practical use except to consume public funds. It hears evidence for the prosecution, and knows but one side of a case, which can easily be made out before the august body that finds the indictment. Reformation demands that it stand to one side, as it is but a thorn in the side of justice, because more cases are dismissed after bills are found than are dismissed prior thereto.

In conclusion, permit me to say, it is high time the profession look for reform in the future. Some are always amusing themselves by diving into the depth of the forgotten past, proving everything and at all times looking backward for law to support the present, with all of its changed surroundings. Shall we, then, continue a system so full of vagaries and incongruities? Each day and hour every system, every institution, however useful in the past, whatever may be its claims on the revenue or affections of mankind, must, sooner or later, be brought to the test of present and practical worth; and, like the law book of old, take its place on the shelves of antiquity to make room for the present up-to-date volume of solidified law, purged of all abuses and forever stripped of that which is useless.

KIRK HOFFMAN.

Greenville, O., Feb. 18, 1897.

#### SUPREME COURT OF OHIO.

##### Official Record of Proceedings.

Causes to and including No. 4666, on the general docket, are called and marked submitted. The next call will be to and including No. 4773.

TUESDAY, March 2, 1897.

#### General Docket.

4013. The Lake Shore & Michigan Southern Railway Co. v. The State of Ohio *ex rel.*, George L. Lawrence. Error to the circuit court of Cuyahoga county. Judgment affirmed.

4158. The Merchants' National Bank of Cincinnati, v. Luther M. Peman. Error to the circuit court of Hamilton county. Judgment affirmed.

4207. The Village of Tippecanoe v. John W. Underwood. Error to the circuit court of Miami county. Judgment affirmed.

4211. Charles A. Long v. Charles C. Minner. Error to the circuit court of Muskingum county. Judgment affirmed.

4586. The State of Ohio *ex rel.* Attorney-General v. James P. Seward. *In quo warranto*. Prayer of petition granted and defendant ousted.

4718. George Conner et al. v. R. B. Gordon, Jr., Auditor et al. Error to the circuit court of Auglaize county. Judgment affirmed. Minshall, J., dissents.

4719. Clement Ohler et al. v. R. B. Gordon, Jr., Auditor et al. Error to the circuit court of Auglaize county. Judgment affirmed. Minshall, J., dissents.

4733. Peter Scherer v. The State of Ohio. Error to the court of common pleas of Hamilton county. Judgment affirmed.

4952. J. G. McCullough et al., Receivers, v. Thomas P. Jones. Error to the circuit court of Trumbull county. Judgment affirmed.

4993. The State of Ohio *ex rel.* Attorney-General, v. John Miller. *Quo warranto*. Petition dismissed.

5001. The Broadway & Newburgh Street Ry. v. Joseph H. Schmitt, Admr. Error to the circuit court of Cuyahoga county. Judgment affirmed.

5077. The Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. John Millhorn. Error to the circuit court of Harrison county. Judgment affirmed.

5134. The Cleveland & Marietta Ry. Co. v. James R. Scott. Error to the circuit court of Guernsey county. Judgment affirmed.

5230. The State of Ohio *ex rel.* J. H. Weller et al. v. W. D. Guilbert, Auditor of the State of Ohio. *Mandamus*. Demurrer to the petition overruled for the reason that the question sought to be made does not appear in the petition. Leave to answer by March 20, 1897.

5315. John Burson et al. v. Peter Hixson. Error to the circuit court of Athens county. Judgment affirmed.

The following causes on the general docket have been dismissed for failure to file printed record:

5375. Charles Klever et al. v. H. W. Riddle. Error to the circuit court of Madison county.

5376. William Evans et al. v. Michael Riley. Error to the circuit court of Madison county.

**Motion Docket.**

2871. *Adelia Morris v. Harriet Woodburn.* Motion by defendant to advance cause No. 5360, on the general docket. Motion allowed, cause advanced. Briefs to be filed within rule.

2873. *The City of Fremont, Ohio, v. W. V. B. Ames.* Motion by plaintiff for leave to file cause No. 5354, on the general docket. Motion sustained and cause dismissed.

2874. *The City of Fremont, Ohio, v. W. V. B. Ames.* Motion by plaintiff for leave to file printed record instant in cause No. 5354, on the general docket. Motion overruled.

2875. *The P., C., C. & St. L. Ry. Co. v. May Jamison, an infant by etc.* Motion by defendant to advance cause No. 5122, on the general docket. Motion overruled.

2876. *Catherine M. Bregel et al. v. Joseph A. Kleiner, Admr., et al.* Motion by plaintiffs for time to file printed record in cause No. 5412, on the general docket. Motion allowed, and time extended to May 1, 1897.

2877. *The State of Ohio ex rel. Franklin Alter v. Frederick Bader et al.* Motion by defendants to advance cause No. 5425, on the general docket. Motion allowed, cause advanced, and briefs to be filed within rule.

2878. *John Bolon v. Cephas W. Starr.* Motion by plaintiff to reinstate cause No. 5356, on the general docket. Motion allowed by consent, and time for filing printed record extended to May 1, 1897.

2879. *The State of Ohio v. John Rose.* Motion by plaintiff to advance cause No. 5242, on the general docket. Motion allowed, cause advanced and briefs to be filed within rule.

— *Davis S. June et al. v. The City of Fremont.* Application for rehearing of cause No.

4005. Application not entertained on authority of *Sabin v. Cocran et al.*, 52 Ohio St., 690.

**New Cases.**

New cases filed in the Supreme Court since February 24, 1897:

5469. *Emile Werk v. The Poudenville Banking Co.* Error to the circuit court of Hamilton county. C. W. Baker, for plaintiff. Outcalt & Granger, for defendant.

5470. *Emile Werk v. J. S. Barrett.* Error to the circuit court of Hamilton county. C. W. Baker, for plaintiff. Ernst Rehn, for defendant.

5471. *The Farmers' Bank of Loudenville, v. Minnie A. Phifer et al.* Error to the circuit court of Ashland county. J. C. Laser, for plaintiff. F. V. Owen, for defendants.

5472. *Mary C. Moss, Admx., v. The C., H. V. & T. Ry. Co.* Error to the circuit court of Fairfield county. John G. Reeves and John S. Brasee, for plaintiff. A. I. Vorys, for defendant.

5473. *J. W. Brindle v. E. L. Miller et al.* Error to the circuit court of Ashland county. McCray, Kenny & Goard, for plaintiff. Laset, Bricker & Workman, for defendant.

5474. *Charles D. Campbell, Auditor, v. The State of Ohio ex rel. Hamilton, Treas.* Error to the circuit court of Logan county. S. H. West, S. J. Southard and J. N. Order, for plaintiff. W. H. West and J. E. West, for defendant.

5475. *The State of Ohio ex rel. Attorney-General v. The St. Paul Fire Ins. Co.* Quo warranto. Attorney-General, for plaintiff.

5476. *The State of Ohio ex rel. Attorney-General v. The Hone Ins. Co.* Quo warranto. F. S. Monnett, Attorney-General, for plaintiff.

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An important ruling has been made in the appellate court of Illinois regarding the granting of "midnight injunctions." Justice Gary holds that it is error for a judge to issue an injunction at his residence. If this holding is followed the "midnight injunction" will be a thing of the past in that state, and lawyers will be compelled to transact business with the courts during open hours.

Judge Ferris, of the Hamilton county probate court, recently had the following question before him: Where, in separate items of a will, two or more legacies or devises are given to the same non-exempt persons, does the inheritance tax law allow a \$200 exemption on each legacy, or is there to be but one such exemption on the aggregate taken by such person? The court in answering this question held that as "all property which shall pass \* \* \* shall be liable to a tax of five per centum of its value above the sum of \$2 000," it matters not whether the property pass under one or more items of the will, or whether the property passing under more than one item be real or personal, the tax is collectable on the aggregate of such property less \$200, which is exempt.

## DEATH OF JUDGE MARTIN.

Judge Matthias Martin, of Columbus, died at his residence in that city, Tuesday morning of this week. The deceased was born in Columbus, November 29, 1818, and in early life he learned the trade of painter, and later on embarked in the newspaper business, and afterwards became an editor of *The Statesman*. He served four years as clerk of the national House of Representatives and for two years was the librarian of the House. In 1856 he ran for congress, his opponent being S. S. Cox. In 1861 he was elected county auditor, and in 1863 was reelected. Toward the close of his life he served as justice of the peace for nine-years, and the last office held by him was that of judge of the police court. At the time of his death the judge leaves surviving him a widow and several children to mourn his loss.

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**DISTRIBUTION OF OUTSIDE RELIEF.**

An opinion of general interest to all county infirmiry directors was submitted by Director of Law Bargar, of Columbus, last Friday, to Director Holmes, in which he defines the relative authority of the county infirmiry directors and the township in the distribution of outside relief. The opinion is as follows:

Dear Sir—Replying to your letter of March 1, I beg leave to say: Section 975 of the Revised Statutes was repealed by the legislature of Ohio, April 16, 1896. This statute, as repealed, authorized the furnishing of assistance to the poor outside of the county infirmiry and provided how costs for relief should be paid.

There is, therefore, no authority of law for furnishing such relief in the manner as heretofore under said statute, nor would the county treasurer be authorized to pay bills or vouchers therefor. The matter is left now, by statute, in the hands of the township trustees, who are authorized to make a levy therefor. In this city the city limits are co-extensive with the limits of Montgomery township and the functions of township trustees vest in the department of public safety. This department would have authority under section 2827 of the Revised Statutes, on or before the 15th day of May each year, to determine the amount of taxes necessary, subject to the limitations of said section, for the relief of the poor outside of the county infirmiry, and having so determined should certify the amount to the county auditor to be placed upon the duplicate and collected as other taxes. When so collected, the distribution of such fund would be under the supervision of the department of public safety, exercising the functions of the board of township trustees.

The poor department will be continued as if no change in the law had been

enacted and whatever cost results will doubtless be provided for when the annual poor levy for Montgomery township is made on May 15.

**FIRST DEGREE MURDER.**

[Seneca Common Pleas Court, December 27, 1895.]

THE STATE OF OHIO, v. LEONARD J. MILLER, *alias* LEVI J. MILLER, *alias* LEON J. MARTIN.

**CHARGE TO THE JURY.**

[Delivered by Judge Schaufelberger.]

*Gentlemen of the jury:* The defendant, in this case, Leonard J. Miller, otherwise called Levi J. Miller, otherwise called Leon J. Martin, stands charged with the crime of murder in the first degree.

Section 6808, of the Revised Statutes of this state, provides that "Whoever purposely, and of deliberate and premeditated malice \* \* \* kills another, is guilty of murder in the first degree."

Section 6810, provides that, "Whoever purposely and maliciously," except as provided in Section 6808, just read, "kills another, is guilty of murder in the second degree."

Section 6811, provides that, "Whoever unlawfully kills another," except as provided in the two sections read, viz., sections 6808 and 6810, "is guilty of manslaughter."

The indictment in this case charges in substance that, on the 23rd day of October, A. D. 1895, within the County of Seneca and State of Ohio, Leonard J. Miller, alias Levi J. Miller, alias Leonard J. Martin, in and upon one August Schultz, then and there being, did unlawfully, purposely, and of deliberate and premeditated malice make an assault, in a menacing manner, with intent him, the said August Schultz, unlawfully, purposely, and of deliberate and premeditated malice, to kill and murder; and that the said Leonard J. Miller, alias Levi J. Miller, alias Leon J. Martin, then and there, had and held in one of his hands a certain pistol charged with gun powder and one leaden bullet, which pistol he then and there, unlawfully,

purposely and of deliberate and premeditated malice, did discharge and shoot off against and upon the said August Schultz with intent beforesaid, and, with the leaden bullet aforesaid, out of the pistol aforesaid, by force of the gunpowder aforesaid, by him discharged and shot off as aforesaid, did strike, penetrate and wound the said August Schultz, in and upon the left side of his chest, thereby giving to the said August Schultz with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, in and upon the left side of the chest of the said August Schultz, one mortal wound of the depth of fifteen inches, and of the breadth of one-half of an inch, of which mortal wound he the said August Schultz, then and there, died; and hence the said Leonard J. Miller, alias Levi J. Miller, alias Leon J. Martin, him, the said August Schultz, in the manner and by the means aforesaid, unlawfully, purposely, and of deliberate and premeditated malice, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Ohio.

To this indictment the defendant, Leonard J. Miller, alias Levi J. Miller, alias Leon J. Martin, has pleaded not guilty. The legal effect of this plea of not guilty, is to deny and put in issue each and every material fact contained in the indictment, and every element necessary to convict the defendant of any crime charged or included in the indictment.

In the trial of persons charged with crime, the law raises no presumption of guilt against the accused, but, on the contrary, every presumption of the law is in favor of his innocence, and in this case, it will be your duty to acquit the defendant, unless, upon consideration of all the evidence produced on the trial, you are all satisfied, beyond a reasonable doubt, of the truth of each material fact contained in the indictment, and of the existence of every element which is necessary to constitute the crime charged or included in the indictment. This presumption of innocence is not an idle one. It is intended to, and should, inure to the benefit of the defendant upon every material fact which you are called upon

to consider, and must be recognized by you in your deliberations. This presumption must not only be overcome by the state, but the state must go further and satisfy each of you, by the evidence, beyond a reasonable doubt, that the defendant is guilty; otherwise, it will be your duty to acquit him.

By the words "reasonable doubt" is meant a doubt which has some good reason for it, arising from the evidence in the case. In other words, a reasonable doubt is that state or condition of mind, which, after a fair and full comparison and consideration of all the evidence in the case, both on behalf of the state and the accused, prevents you from saying and feeling to a moral certainty that the defendant is guilty of the crime charged. If you have such doubt, if your conviction of the defendant's guilt, as charged in the indictment, does not amount to a moral certainty, from the evidence in the case, then you are not satisfied beyond a reasonable doubt, and, in that event, it will be your duty to find the defendant not guilty.

A reasonable doubt, however, does not mean a doubt which may arise from a mere whim or caprice. It must be an actual, honest, substantial doubt, arising on a consideration of all the evidence in the case. If, after fairly and fully comparing and considering all the evidence in the case, you can say and feel that you have an abiding conviction of the truth of each material fact contained in the indictment, then you are satisfied beyond a reasonable doubt. And while the law requires each of you to be satisfied, by the evidence, of the defendant's guilt beyond a reasonable doubt, to warrant you in convicting him of the crime charged, it at the same time prohibits you from going outside of the evidence to hunt up doubts upon which to acquit him.

The indictment in this case charges the defendant, Leonard J. Miller, alias Levi J. Miller, alias Leon J. Martin, with the highest crime of felonious homicide known to the law, viz.: murder in the first degree. The indictment also includes the two lower grades of homicide, viz.: murder in the second degree and manslaughter; and also the minor offences of assault and battery, and assault; ar

under this indictment, according as the evidence may require, you may find the defendant not guilty, or guilty of murder in either the first or second degree, or of manslaughter, or of assault and battery, or assault.

The killing of a human being may be either justifiable or excusable, or felonious and criminal. The killing is justifiable when done in the necessary or apparently necessary defense of one's self or family from death or great bodily harm, attempted to be committed by force. It is excusable when one, in doing a lawful act, by mere accident, unfortunately kills another. When the killing is neither justifiable nor excusable, and the slayer is not insane, it is felonious and criminal, and it may be murder in either the first or second degree, or manslaughter, according as the facts proved on the trial may warrant.

The material facts contained in the indictment in this case are, first, time, viz.: the 23d day of October, A. D. 1895; secondly, place, viz.: in the county of Seneca and state of Ohio; thirdly, the body of the crime, viz.: that the crime of murder in the first degree, which includes the lower grades of homicide, as already explained to you, was committed in a manner and form as charged in the indictment; and fourthly, identity, viz.: that the defendant, Leonard J. Miller, alias Levi J. Miller, alias Leon J. Martin, is the person who committed that crime.

These facts, together with all the elements which constitute the body of the crime charged, as already explained to you, are denied and put in issue by the defendant's plea of not guilty. In determining these issues you should carefully consider the whole of the evidence, both on behalf of the state and the accused, all the testimony and the circumstances proved on the trial, and give to the several parts of the testimony and to the circumstances proved, such weight as you think them entitled to; and in determining the weight to be given to the testimony of the several witnesses who have testified, and you are the sole judges as to how much or how little weight shall be given, it is proper for you to take into consideration their con-

duct and demeanor on the stand while testifying, their apparent fairness, or bias, if any such appears, their opportunities of knowing what they testified to, the reasonableness of their testimony, and any manifest interest, if any, which they may have in the result of this trial, and give to the testimony of each witness such weight as under all the circumstances you think it entitled to.

One of the defenses interposed on behalf of the accused is, that at the time he is alleged to have committed the crime charged, he was not of sound mind, was at times affected by melancholy, and laboring under certain insane delusions; in other words was insane.

Much testimony has been given on behalf of both the defense and the prosecution which tends to show the defendant's mental condition at, prior and immediately subsequent to the time of the alleged killing; the testimony of relatives, neighbors and acquaintances of the accused, as well as of physicians and medical experts. The statements of witnesses who testify as to actual observations of and communications with, the defendant at various periods of his life, should be carefully received and scrutinized by you, and given such weight, as under the rules already given, you think them entitled to. The opinions of experts, based solely upon facts assumed in the hypothetical questions propounded to them, are entitled to greater or less weight according as the facts so assumed may or may not have been established by the evidence, and according to the experience and means of observation enjoyed by such experts, and the care, fairness and impartiality manifested by them while testifying; and, hence, their opinions should be received by you with great caution. You should not take for granted that the statement of facts contained in the hypothetical questions pronounced to the expert witnesses are true; on the contrary, you should carefully examine and weigh the evidence and from that determine which, if any, of those statements are true, and which, if any, are not true, before giving effect to the opinions based upon such statements; such opinions as are based wholly upon a fair statement of all the facts estab-

lished by the evidence are entitled to much weight in your consideration of this question. On the other hand, such opinions as are based only upon a partial statement of the facts so established, or upon a statement of facts, some of which have not been so established, are entitled to little or no weight in your considerations.

Many witnesses who are not physicians or experts have also given their opinions as to the sanity or insanity of the accused. These opinions are also to be received and considered by you with caution, and given such weight as you may deem them entitled to. These non-expert witnesses have been required to state the facts upon which they base their opinions in order that you might be enabled the better to test the correctness of their opinions, and the opinions of such witnesses may be entitled to much, little or no weight according to the witnesses' familiarity with the accused, their means of observing him and knowing him as shown by their testimony, as well as their manifest intelligence and fairness, or unfairness, towards him.

Your verdict, on this question of insanity, must be formed upon the facts proved and opinions given by professional and non-professional witnesses on the trial. You have, therefore, both facts and opinions to consider and weigh. The credibility of all witnesses is not the same; the value of all their opinions is not the same. Hence, you must exercise your judgment and good sense and do justice accordingly, basing your judgment upon such facts and opinions as you deem worthy of consideration. The medical testimony given in the case, if without bias in favor of either party, may be a salutary means of assisting you in deciding the case on consistent and sound principles. But, as already explained, such testimony should be received with great caution, and, like the opinions of neighbors and acquaintances, should be regarded as of little weight if not well sustained by reasons and facts that admit of no misconstruction.

Insanity is recognized by the law as a proper and legitimate defense in criminal prosecutions, and will excuse the

commission of a criminal act, when it is made to appear affirmatively, by a preponderance of the evidence, that the person committing the act was at the time insane, and that the act in question was a direct consequence of his insanity.

The law recognizes partial as well as general insanity; that a person may be insane upon one or more subjects and sane as to all others; that he may be laboring under an insane delusion upon some particular matter or regarding some particular person, and generally sane upon all other subjects. As regards the guilt or innocence of a person charged with the commission of a crime, it makes no difference whether the act charged was produced by general insanity, or by an insane delusion regarding some particular person or subject. If the person charged was at the time of the alleged crime laboring under an insane delusion, and the act itself was the product of such delusion, and the accused at the time did not know or realize that he was doing wrong or committing a crime, then he cannot be held criminally responsible for the act.

On the other hand, although the person charged may, at the time of the alleged crime, have been laboring under insane delusions, yet if the act itself was not the product of such delusion, and the accused at the time knew and realized that he was doing wrong and committing a crime, then the law holds him criminally responsible for the act.

While, then, the defense of insanity is to be regarded as a not less full and complete, than a humane defense, when satisfactorily established, and while you should guard against inflicting the penalty of crime upon the unfortunate person whose mental faculties are deranged or destroyed, you should be equally careful that you do not suffer mere theories or opinions which are not well sustained by reasons and facts, to furnish protection to guilt.

Was, then, the defendant, at the time of the alleged killing of August Schultz, insane and irresponsible to the law?

In determining this question, you must be in mind that the law presumes every person who has reached the age of discretion to be of sufficient mental capacity to form the criminal purpose, and

to deliberate and to premeditate upon the acts which malice, anger, hatred, revenge or other evil disposition might impel him to perpetrate. To defeat this legal presumption which meets the defense of insanity at the threshold, the mental alienation relied upon by the accused must be affirmatively established by the evidence, and the burden of establishing the insanity of the accused, rests upon the defense. It is not sufficient if the evidence barely shows that insanity, general or partial, was possible. The proof must be of such forces and character as to annul the legal presumption of sanity; it must reasonably satisfy you that the defendant was not sane. In other words, the defense must satisfy you, by a preponderance of the evidence, that, at the time of the alleged killing of August Schultz, the defendant was affected by insanity, or by some insane delusion, or homicidal mania, to such an extent that he did not know what he was doing, or that he did not know that what he was doing was wrong.

The statute, as you will remember, defines murder in the first degree as the purposely killing of another with deliberate and premeditated malice. Purposely, implies an act of the will, an intention, a design to do the act. It presupposes the free agency of the actor; free to act or abstain from action; free to embrace the right and reject the wrong. Deliberation and premeditation, require action of the mind. They are operations of the intellectual faculties, and require an exercise of reason, reflection, judgment and decision and it cannot happen in any case where the faculties of the mind are deranged, destroyed, or do not exist. Therefore, the following questions afford a very satisfactory test, and it is the legal test, as to whether the condition of the defendant's mind was such as to render him irresponsible for the alleged crime within the meaning of the law, viz: 1st. Was he, the defendant, a free agent in forming the purpose to kill? 2d. Was he, at the time the act was committed, capable of judging whether the act was right or wrong? 3d. Did he know, at the time, that the act was an offense against the laws of God and man?

If from the evidence you say "No," he is innocent; if "Yes," and you find the

killing to have been done purposely, with deliberate and premeditated malice, he is guilty. In other words, if, upon a full consideration of all the evidence in the case, all the testimony and the circumstances proved, you believe from a preponderance of the evidence that the defendant's mental condition was such that he was not a free agent in forming the purpose to kill August Schultz, or that he was not capable of judging whether that act was right or wrong, and did not know, at the time of the fatal shot, that he was committing a crime, then your verdict should be that you find the defendant not guilty by reason of insanity. If, on the other hand, you believe from the evidence that the defendant was a free agent in forming the purpose to kill August Schultz, that he was at the time capable of judging whether that act was right or wrong, and that he knew at the time that he was committing a crime, then the law holds him criminally responsible for the act done.

Another defense urged on behalf of the accused is, that the killing of August Schultz was justifiable on the ground of self defense. This defense, like that of insanity, to be available as a defense, must be affirmatively established by the evidence, and the burden of proving the facts which are necessary to justify the homicide, rests upon the defendant.

Under the law of this state homicide is excusable on the ground of self defense only under the following circumstances each of which must be established by the accused, by a preponderance of the evidence, to authorize a verdict of acquittal, viz.: The slayer, in the careful and proper use of his faculties, must believe in good faith, first that he is in imminent danger of death or great bodily harm; although in fact he may be mistaken as to the existence, or imminence of danger. Second, that his only means of escape consists in taking the life of his assailant. And third, there must be reasonable ground for such belief.

In order to determine whether or not the defendant, at the time and place of the alleged killing, believed in good faith that he was in imminent danger of death or great bodily harm, and had reasonable grounds for such belief, it is proper that

you should understand the rights and duties of Marshal Schultz and his assistants, as well as those of the defendant.

Under the laws of this state, the mayor of any city of the second class, fourth grade, has jurisdiction, in criminal cases, throughout the county in which such city is situated, and may, by warrant issued by him, cause any person charged with the commission of a felony or misdemeanor to be arrested and brought before himself for the purpose of inquiring into the complaint; and it is by law made the express duty of the marshal of such city to execute all warrants and writs so issued and directed to him by the mayor. He must forthwith arrest and bring before the mayor, the person or persons, named in such warrant, and his jurisdiction for that purpose is co-extensive with the county. And in this case, if you believe from the evidence that the city of Tiffin, in Seneca county, was at the time in question a city of the second class, fourth grade, and exercising the functions of such city, that August Schultz was the marshal thereof, that the mayor of said city issued a warrant directed to said marshal for the arrest of the defendant, and that the defendant was then within Seneca county, then you will be justified in finding not only that August Schultz was duly authorized to arrest the defendant, but that it was his peremptory duty under the law to arrest him wheresoever found within the limits of the county.

An officer having authority to arrest is under the protection of the law, while in the lawful exercise of that authority. He may take with him such assistance as he may deem necessary, and such assistance, and every one coming to the officer's aid, and in good faith lending his assistance, whether commanded or not, are under the same protection as the officer himself. If being such officer's duty to make the arrest, the law clothes him with the power to accomplish the result. His duty is to overcome all resistance and bring the party to be arrested under physical restraint, and the means he may use are so extensive with the duty. The officer is not required to produce the warrant or authority before making the arrest; and if the person to be arrested is armed and prepared to

make desperate resistance, and the officer believes and, has reason to believe that he will make such resistance if notified of the officer's purpose, or if he has knowledge of the officer's purpose, then the officer is not required to even notify the accused that he has a warrant for his arrest, or to advise the accused of his purpose to make the arrest. The officer should first make the arrest, then he may explain why he made the arrest and then, if the accused desires it, the officer should produce his warrant or authority for making the arrest. The accused has no right to demand an inspection of the warrant until after he has placed himself peaceably into the custody of the officer, knowing him to be such. If the accused by words or threats resists arrest and is visibly prepared to make resistance, the officer and his assistants may use any words, resort to any stratagem, or employ any force, which they may deem necessary, to throw the accused off his guard, and to overcome the resistance made, or threatened, in order to accomplish the arrest without injury to themselves.

Hence in this case, if you believe from the evidence that August Schultz, as marshal of the city of Tiffin, was, at the time in question, authorized and had a warrant for the arrest of the defendant, then it follows as a matter of law that he had a right to take with him officer Sweeney and Abraham Sheidler to assist him, and if after arriving at defendant's house and gaining admittance, you believe from the evidence, that he, the defendant, made threats of resistance by declaring that he would not be taken alive, and was armed with deadly weapons and visibly prepared to make desperate resistance, then Marshal Schultz was not required to produce his warrant to the defendant; nor was he required to notify defendant that he had a warrant, or even that he intended to arrest him, if in good faith he believed, and had good reasons to believe, that by giving such notice, serious injury would result to himself or assistants. The marshal's warrant was a protection to him and his assistants for all words or acts reasonably necessary for its execution, and if a struggle ensued between the defendant

and the marshal and Officer Sweeney, Mr. Sheidler had a right, and it was his duty, to come to the officers' aid and give his assistance, whether commanded by Marshal Schultz or not.

[CONCLUDED NEXT WEEK.]

## SUPREME COURT OF OHIO.

### Official Record of Proceedings.

#### General Docket.

TUESDAY, March 9, 1897.

4096. Eliza Heaton, etc. v. John N. Eldridge et al. etc. Error to the circuit court of Franklin county. Judgment of the circuit court reversed and that of the common pleas affirmed. This case was argued to the first division and considered by the whole court. To be reported.

4155. Samuel A. Cooper v. The Toledo & Ohio Central Ry. Co. Error to the circuit court of Hancock county. Judgment affirmed.

4212. The Wheeling & Lake Erie Ry. Co. v. Jacob Rebman. Error to the circuit court of Medina county. Judgment affirmed on the authority of Fries v. The Wheeling & Lake Erie Ry. Co.

4285. Maggie B. Minnear v. Emma Holloway. Error to the circuit court of Morrow county. Judgment of the circuit court reversing the judgment of the common pleas affirmed. The judgment rendered after the reversal is reversed and the cause remanded to the common pleas for a new trial. To be reported.

4349. The B. & O. S. W. R. R. Co. v. Frank Litter. Error to the circuit court of Ross county. Dismissed by plaintiff in error at its costs and without record.

4403. Valentine Fries v. The Wheeling and Lake Erie Railway Co. Error to the circuit court of Huron county. Judgment reversed and cause remanded to the circuit court with instructions to pass upon the assignments of error not considered by that court. To be reported.

4419. George W. Weiser v. The Broadway & Newburgh Street R. R. Co. Error to the circuit court of Cuyahoga county. Judgment affirmed.

4427. Fred J. Graef v. Philip J. Gates. Error to the circuit court of Miami county. Judgment affirmed.

4472. Abraham Darling v. the Trustees of Monroe township, Richland county. Error to the circuit court of Richland county. Judgment affirmed.

4483. Joshua B. Owsley v. Clarence Murphy, Assignee, et al. Error to the circuit court of Butler county. Judgment affirmed.

5136. The Cleveland & Marietta Ry. Co. v. Alice T. Irwin, Admx. Error to the circuit court of Guernsey county. Judgment affirmed.

5140. The City of Cincinnati v. William Holmes, Admr., etc., et al. Error to the circuit court of Hamilton county. Judgment of the circuit court reversed and that of the common pleas affirmed. Burket, C. J., dissents. To be reported.

5336. James Reed et al. v. the State of Ohio ex rel. Thomas J. McDermott, etc. Error to the circuit court of Muskingum county. Judgment affirmed.

5385. Elmer E. Pearson, Auditor, et al. v. H. M. Stephen. Error to the circuit court of Miami county. Judgment reversed. Burket, C. J., and Shauck, J., dissent. To be reported.

#### Motion Docket.

2843. W. R. Ryan et al. v. L. Dean Holden, Trustee. Motion by defendant to dismiss cause No. 5370, on the General Docket. Motion overruled.

2872. H. nnah I. ell v. the State of Ohio. Motion for leave to file a petition in error to the circuit court of Franklin county. Motion allowed and cause advanced.

2880. James B. Gornley, Assignee v. E. J. Cunningham. Motion by defendant to dismiss cause No. 4621, on the General Docket. Motion overruled.

2881. The Good Templar Lakeside Building Co. v. W. M. Filabaum et al. Motion by defendant to dismiss cause No. 3294, on the General Docket. Motion overruled.

2882. William Haas v. The State of Ohio. Motion for leave to file a petition in error to the circuit court of Hamilton county. Motion overruled.

2883. The Superior Coal Company v. America Hollingsworth, Admx. Motion by defendant to dismiss cause No. 5361, on the General Docket. Motion allowed and cause dismissed.

#### New Cases Filed in the Supreme Court Since March 3, 1897.

5477. Elihu Matthews et al. v. Jennie M. Krisher et al. Error to the circuit court of Hardin county. C. C. Lennert, Derr & Corbet and W. D. Matthews, for plaintiffs. Henry K. May and Black & Mahon, for defendants.

5478. The O. S. Kelly Co. v. Bernard Lobenthal et al. Error to the circuit court of Crawford county. Edward Vollrath, for plaintiff. Smith W. Bennett and W. J. Geer, for defendants.

5479. Edward M. Spangenberg et al. v. Phillip Ginney. Error to the superior court of Cincinnati. J. J. Gasser, Ed. M. Spangenberg and Fred. Clark, Jr., for plaintiff.

5480. The State of Ohio on the relation of Frank S. Monnett, Atty. General, v. The Windsor Loan & Building Co. Quo warranto. Frank S. Monnett, Attorney General for plaintiff.

5481. Laura L. Lynch by etc. v. Benj. S. Cogswell, Exr. Error to the circuit court of Cuyahoga county. Gilbert & Hills for plaintiff. George A. Groot, for defendant.

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Judge Samuel W. Smith, one of the newly elected judges of the Hamilton common pleas court, handed down an important opinion in view of the recent holding of the supreme court in regard to mechanic's liens. The question arose in the case of *J. W. Owen & Co. v. Louis Murry et al.*, in which the court held that the sub-contractors should be allowed to prosecute their claims, and leave was given them, as well as the owner, to further amend or file any pleadings that may be necessary as between the owner and the sub-contractors to bring the case to issue.

The Franklin circuit court last week decided that the Earnhart law is constitutional. The constitutionality of this law was brought in question by the leasing of the Hocking Canal to the Columbus, Hocking Valley & Athens Railroad Company. The suit brought to test the validity of this law was brought in the common pleas court over three years ago, and that court decided in favor of the law, Judge Pugh rendering the decision. The plaintiffs in this suit claimed that the law was against their water rights. The cases were afterwards carried to the circuit court which sustained the decision rendered by Judge Pugh. The decision of the circuit court was written by Judge Summers and is a very able one.

In his interesting reminiscences of the Erie county bench and bar, published in the January number of the *Western Reserve Law Journal*, John T. Beecher gives this very humorous incident in the career of Lucas Selkirk Beecher:

"Near the close of Mr. Beecher's practice his hearing became impaired. A farmer who lisped called at his office to employ him to bring an action against the L. S. & M. S. Ry., to recover damage for negligently killing some of his pigs. Mr. Beecher understood the farmer to claim that the company had killed three thousand of them, and said to the client interrogatively, 'Three thousand and all at one fell swoop?' Whereupon the farmer shouted, 'No! No! Great God, no! three thows and pigths.'"

Judge Dow, of the Union common pleas, made an important decision in regard to the fish and game laws recently, which knocks out the law as amended last winter. The case arose over the fact that one Moder shot some fish in Mill creek last summer, and was arrested by the game warden and brought before a justice of the peace, who dismissed the case. The case was then taken to the court of common pleas on mandamus, to compel the justice to assess a fine. Judge Dow dismissed the case, on the grounds that the law as amended last winter, does not prohibit the shooting of fish.

The circuit court of Franklin county has dismissed the petition in error in the famous \$8,000,000 Hocking Valley case. Over two years ago the Central Trust Co., of New York, began suit against Judge Stevenson Burke, of Cleveland, and others, who reorganized the Hocking Valley Railroad, to recover for the \$8,000,000 of bonds issued by them. After Judge Pugh, of the Franklin common pleas, had overruled the defendant's demurrer to the petition, the case was allowed to rest for about a year, then the Trust Co. filed a motion to dismiss the case; to this, holders of the bonds objected, and Judge Pugh overruled the motion. The case was then carried to the circuit court, which dismissed the petition on the ground that Judge Pugh's decision was not a final order. In all probability the case will now go to the supreme court, and just what its outcome will be is awaited with a great deal of interest.

The end of the "easy divorce" system in North Dakota appears to be in sight. The house of representatives of that state having passed, by the overwhelming vote of forty-four to five, a bill extending the period of residence required from applicants for divorce from three months to one year. The passage of the bill by the other branch of the legislature ensures its enactment into law, and thus a great scandal, which has brought the state and its people into disrepute, will be done away. Much deserved criticism has been directed against the state for the inducements its

tax laws have held out to those seeking legal separation, and if this bill shall become a law, as now seems altogether probable, thanks to the reawakened moral sentiment of the community, some other state must become the Mecca of the loose moralist the United States over. North Dakota has evidently concluded that a good name is more to be prized than the wages of sin and vice, however liberal they may be.

In the case of *The State of Ohio v. James Williams*, indicted for murder in the second degree, and also a finding under the habitual criminal act, tried at the present term of the Belmont common pleas court, the defendant was found guilty as charged. The defendant plead in bar a pardon to one of the former convictions to which the state interposed a demurrer, which was sustained by Judge Dreggs, the former judge. On a motion to set aside the verdict of the jury for a new trial, Judge Hollingsworth, the present incumbent, sustained the motion as to the latter conviction, holding the sustaining of the demurrer to the plea in bar, error. This raises a new question in our state and may be of some interest to the profession. The case discloses a legal paradox and points the necessity of some legislation. Williams was convicted of murder in the second degree and also of being an habitual criminal. If the latter conviction had been right, which it would have been but for the pardon—the sentence would have been a judicial farce. To sentence him for life and then to be retained for the remainder of his days.

The enforcement of the act passed by the legislature, March 3, 1896, which provides that honorably discharged union soldiers shall have preference in all appointments in the various public departments of the state and municipal corporations within the state, is to be brought about by mandamus proceedings which are to be brought by the Wooster G. A. R., who desire to get a construction of this statute, and secure its enforcement in that county. The question will be brought about by that body by making an application to the

supreme court for a writ of mandamus to compel the county commissioners of Wayne county to employ an honorably discharged union soldier in the position of janitor of the courthouse and county buildings.

If the act can be enforced it will furnish employment to many soldiers throughout the state. The question raised is of sufficient importance to warrant the supreme court in taking it up in the first instance, and not compel the relators to waste unnecessary time in the lower courts until the act will become inoperative by reason of the age of the soldiers. The law is a just and honorable one, and to allow it to remain upon the statute books and not be able to enforce it is an outrage, which every law abiding citizen should try and remedy.

#### TRIBUTE TO A DEAD JURIST.

At the opening of the circuit court at Bowling Green, Wood county, Monday afternoon, the following resolutions were adopted in honor of the late Judge Scribner of Toledo, and ordered spread on the records of the court.

"Resolved, By the bar of Wood county:

"That in the death of Hon. Chas. H. Scribner the bench and bar of Ohio have lost a man whose learning, ability, purity and fair mindedness made him an honor to the legal profession.

"The qualities of head and heart which made him beloved by all while living will remain with us in grateful remembrance, stimulating us to strive more earnestly for whatsoever things are honest, whatsoever things are pure, and whatsoever things are of good report.

"We tender our earnest sympathy to his bereaved family.

"We respectfully ask the court of which he was a member, to give these resolutions a place on its records, to the end that future generations reading them may realize the esteem in which Judge Scribner was held by those who saw him from day to day under the strong light which always beats upon the judicial office."

#### SATURDAY HALF HOLIDAY LAW.

The circuit court of Cuyahoga county, on Wednesday of last week rendered a decision of great importance to cities having a population of 50,000, or over. In other words the court in the decision rendered decides that the Saturday half holiday law passed by our legislature last spring is unconstitutional. The case upon which the circuit court declared the law to be unconstitutional was that of *Diemer v. Hudson*, constable. This was a replevin case and the claim was made that a writ made out and served on a Saturday afternoon, was illegal. In the common pleas court Judge Dissette declared that the proceeding was illegal because the writ was served on a legal half holiday; this declared the half holiday law to be constitutional. In the circuit court the decision was rendered by Judge Caldwell, who in rendering his opinion, said in part: "The half holiday law is one on a general subject. A general holiday is a subject of a nature pertaining to every part of the state, and there is no natural distinction existing between those parts of the state that are subject to the law and those that are not. There is no ground whatever upon which the legislature can make that classification, and for this reason the law is unconstitutional. The action of the common pleas court is overruled and the case is remanded."

#### PLUMBER'S LICENSE LAW.

The constitutionality of the plumbers' license law, passed by the last general assembly is to be tested. The initial step was taken Monday, this week, by the filing of an injunction against the plumbers' board of examiners in Columbus, in which it is sought to restrain that body from interfering with the plumbers who failed to pass the necessary examinations.

The law requires that before a master or journeyman plumber shall be qualified to perform plumbing work, he shall first pass a satisfactory examination, to be conducted by a board of examiners, consisting of the president of the board of health, the inspector of buildings, two master plumbers and one journeyman

plumber. Certificates of competency or licenses, as they are called, are issued to successful plumbers at a cost of \$5 to master plumbers, and at a cost of \$1 to journeyman plumbers. The licenses may be revoked at any time by the board of examiners and a penalty of \$5 to \$50 is attached to a violation of the law.

The effect of the operation of the law will be that of creating a material reduction in the number of journeymen plumbers and a lesser effect in a reduction of the number of master plumbers, and the character of the decision rendered as regards the constitutionality of the law will have a most important effect upon the conduct of plumbing business and upon the sanitary character of the work performed, and it will be awaited with interest by plumbers and the department of health.

#### CONSTRUCTION OF BOULEVARDS.

The right of county commissioners to construct boulevards was decided by the circuit court of Franklin county last Friday. The case was that instituted by Mr. Thomas who brought proceedings to enjoin the building of what is known as the Dublin boulevard. The lower court granted the injunction and those favoring the project carried the case to the circuit court, which affirms the judgment of the common pleas. The opinion is as follows:

"We deem it necessary to consider but one question, which in our opinion is decisive of the case.

"Sec. 4829 confers power on the county commissioners to lay out and construct any new county road, or to improve any state, county or township road, or any part thereof, or any free turnpike road, or any part thereof not completed, and may improve several road or parts thereof not free turnpike roads, or parts thereof not completed when the same may be united in one continuous road improvement. The roads which may be so improved are those and only those specified in this section.

"It appears from the record that that part of Fifth avenue embraced in this improvement is a road constructed un-

der the suburban road law, and it does not appear that it is a road of the character of those specified in section 4829. It is *sui generis*. It was constructed under an act passed subsequent to the two-mile assessment pike law and it does not appear that the county commissioners have any jurisdiction over it or one authorized to take it out of the hands of the board of control.

"This being true the proceedings of the commissioners do not provide for a continuous improvement."

#### OPERATION OF GARBAGE PLANTS.

Judge Evans, of the Franklin common pleas, several days ago decided that the garbage reduction plant located in the city of Columbus was a public nuisance. The entry in the case, which is styled *Daniel Munk v. The Columbus Sanitary Works Co.*, is as follows:

"This day this cause came on to be heard upon the pleadings, the evidence and the arguments of counsel and was submitted to the court. On consideration whereof the court finds that the defendant in the operation of its garbage plant is creating a nuisance and in the creation of such nuisance casts upon plaintiff's land and into and about his dwelling, noxious odors, vapors and gases, causing material inconvenience and discomfort to him and his family.

"The court further finds that the plaintiff is entitled to an injunction restraining the defendant from operating its said garbage plant so as to cause offensive and noxious odors, vapors and gases to be cast upon plaintiff's premises in the petition described and into and about his dwelling.

"It is therefore ordered, adjudged and decreed by the court that an injunction be and the same is hereby granted restraining the defendant from operating its garbage plant so as to create or cause to be cast upon the land of the plaintiff in the petition described any offensive, noisome or noxious odors, vapors of gases or into or about the dwelling or plaintiff from and after the first day of May, 1897.

"This day, to-wit: May 1, 1897, is named and fixed by the court in order

that the defendant may, between the date of this entry and the said first day of May, 1897, if it desires so to do, avail itself of the means and agencies within its power to prevent said nuisance. If, however, it shall be made to appear to this court that the defendant does not propose or intend in good faith to make use of the proper means and agencies to prevent said nuisance, said injunction shall be and become operative from and after the date of this entry."

### THE TEN COMMANDMENTS.

A member of the Kansas legislature has taken the revised version of the ten commandments as found in the Exodus and incorporated them in the form of a legislative bill, which he wishes to have, and which probably may, be duly made a part of the criminal procedure of that state. The preamble to the measure is as follows:

#### PREAMBLE.

#### AN ACT TO GIVE STATUTORY FORCE TO THE TEN COMMANDMENTS.

Whereas, The men of the present generation have become doubters and scoffers; and,

Whereas, They have strayed from the religion of the fathers; and,

Whereas, They no longer live in the fear of God; and,

Whereas, Having no fear of punishment beyond the grave, they wantonly violate the law given to the world from Mount Sinai.

The bill which follows is composed of ten sections, each of the commandments constituting a section, and as the readers of the LEGAL NEWS, have the decalogue by rote, it is not necessary to reproduce it.

Section 11 of the bill provides for the punishment of violators of the commandments. The penalties are visited on men only. They are:

For having another God, fine.....	\$1,000
For making a graven image, one year in the penitentiary and a fine of.....	1,000
For taking the name of the Lord in vain and for not observing the Sabbath day, fine.....	500

For not honoring father or mother, six months in the penitentiary and a fine of..... \$ 500

For committing murder, hanged by the neck until dead.

For adultery, penitentiary for life.

For stealing, fine or imprisonment in the discretion of the court.

For bearing false witness, imprisonment in the discretion of the court.

For coveting thy neighbor's house; his wife, his servant, his maid or his ass, fine and imprisonment in the discretion of the court.

Section 12 provides that "this act shall take effect and be in force from and after its publication in the statute book."

### COLLATERAL INHERITANCE TAX HOLDINGS.

Under the will of Ezekiel Simon, after a number of legacies to charities aggregating sixteen thousand dollars, and two bequests to great nieces, the remainder is granted to trustees for the purpose of investment, reinvestment, etc., and to pay the net income to decedent's wife for her life, and also to pay her so much of the principal as she may from time to time require or demand; after her death certain other legacies are to be paid to persons not exempt from the collateral inheritance tax.

Upon an application for instructions by the executor, Judge Ferris yesterday (March 8.) decided that the bequests to charitable institutions and to the great nieces are not exempt from the tax; and also that as the widow has a right to use a part of the principal of the remainder, the value of her estate in the same is not ascertainable, and therefore the legacies over to the non-exempt persons are not taxable. Had the devise to the wife been simply a life estate, the legacies over would be now taxable.

*Max B. May* for executor.

*Thomas H. Darby* for the State.

By the will of Eliza Bates legacies are granted, among others, to nieces and nephews of the testatrix's husband, grand-nieces of testatrix and charitable institutions; also, devices of real estate to grand-nephews. By the inheritance tax law, a penalty of eight per cent. is

collectable in case of non-payment within a year of the death of testatrix, which, in this year of the death of testatrix, which, in this case, occurred more than a year ago.

Judge Ferris held that the statute exempts nieces and nephews of the decedent; that exemptions are not favored; that such exemption does not extend beyond the children of the testatrix's brothers and sisters, and therefore does not cover the case of the nieces of her consort; that grand-nieces and charitable institutions are liable to the tax. Appraisers will be appointed to determine the value of the real estate. The penalty of eight per cent should not be, in justice, collected. The direct inheritance tax was declared unconstitutional, it was supposed the collateral inheritance tax would meet the same fate. There was no effort made to enforce the law which has been now held to be constitutional. The amount of the tax is to be certified by the court to the auditor for listing, and then is payable. Because of what has been stated, this has not been done. The executors have not been negligent, and there is no basis for the imposition of a penalty.

*Peck & Shafer* for executors.

*Healy & Brannan, P. J. Cadwallader, Judge Connor, A. C. Cassatt* for legatees.

*Thomas H. Darby* for State—*Court Index*.

#### ADMITTED TO THE BAR.

At the quarterly examination held at Columbus last week by the committee appointed by the supreme court to examine applicants applying for admission to the bar, two members of the legislature, Senator Howard of Xenia and Representative Landis of Butler county, were among the successful applicants. Seventy-two out of 122 applicants received certificates, as follows.

James D. Armstrong, Lima.  
William G. Baldwin, Warren.  
George C. Barnes, Sabina.  
William C. Bigger, Cadiz.  
Charles Boyd, Wellsville.  
William A. Burrell, Elyria.  
Frank M. Bateman, Washington, C. H.

Ralph A. Beard, Youngstown.  
C. F. Beery, Akron.  
Charles E. Chadman, Conneaut.  
William W. Chapman, Dayton.  
George L. Campbell, Ashland.  
Malcolm G. Davies, Cincinnati.  
Samuel Doerfler, Cleveland.  
M. Francier Dunn, London.  
O. W. Donart, Paulding.  
A. E. Dunning, Cleveland.  
Frank H. Dean, Xenia.  
L. A. Edwards, Ewington.  
H. M. Eggleston, Mt. Vernon.  
Evan E. Eubanks, Jackson.  
Frederick J. Flagg, Toledo.  
S. S. Forrest, Mansfield.  
William K. Gaston, Cadiz.  
George H. Glazzard, Youngstown.  
Clark Burton Hines, Belleville.  
Charles C. Hall, Sidney.  
R. E. Hutchison, Savannah.  
Jacob J. Hawk, Columbus.  
R. W. Hartman, Mansfield.  
R. T. Hatch, Cleveland.  
V. Helbling, Akron.  
Thomas H. Hennessey, Columbus.  
Alfred Heber Holbrook, Lebanon.  
Charles F. Howard, Xenia.  
Robert W. Howard, Jacksontown.  
Harry W. Jewell, Delaware.  
G. E. Keyt, Toledo.  
Samuel C. Landis, Hamilton.  
Anton Mares, Cleveland.  
Hal W. Michaels, Tiffin.  
Andrew S. Mitchell, Mt. Sterling.  
Harry J. Moule, Cleveland.  
Robert W. Manly, Chillicothe.  
D. W. McBride, Jefferson.  
James E. McMahon, Cleveland.  
Kenton A. Miller, Ironton.  
Grant Phillips, Mt. Vernon.  
Jerome F. Patterson, Barnesville.  
Harley S. Pulse, Lynchburg.  
W. M. Paazig, Hunt.  
A. W. Patrick, Delaware.  
A. J. Pearson, Jr., Woodsfield.  
Charles M. Reade, Cleveland.  
Theodore Remley, Elyria.  
Max J. Rudolph, Cleveland.  
N. K. Staley, Troy.  
H. E. Sparron, Logan.  
H. N. Standart, Columbus.  
Jacob Schoen, Cleveland.  
M. L. Spooner, Wooster.  
Ernest Gray Smith, Martin's Ferry.  
Frederick C. Schaal, Toledo.  
B. J. Wilson, Clyde.

Edward H. Tracy, Cleveland.  
 E. K. Trauger, Plymouth.  
 Richard G. Thompson, East Liverpool.  
 Charles W. Walker, Somerset, Pa.  
 George E. Young, Lebanon.  
 B. G. Watson, Columbus.  
 Thomas A. Way, Woodsfield.  
 Lebbens L. Wagner, Lancaster.  
 Charles W. Ziegler, Canton.

#### MEMORIAL OF CHAS. HARVEY SCRIBNER.

Late Circuit Judge, Sixth Circuit of Ohio.

Charles Harvey Scribner was born on October 20, 1826, near Norwalk, Connecticut, and is of English descent. During his early childhood his parents removed to Newark, New Jersey, and in that city he received the rudiments of his education. In 1838 the family removed to the village of Homer, in Licking county, Ohio, where like most farmers' boys, he spent his time working on the farm in summer and going to school in winter. For a short time he worked on a newspaper for pay so small that a well regulated boy of this generation would scorn to take it. When eighteen years of age he was apprenticed to learning the trade of saddler and harnessmaker, but while he worked at learning his trade during the day and earning three dollars a week, at night he put in his time studying law and in October, 1848, he was admitted to the bar at Mt. Vernon.

In 1850 he entered into a professional partnership with H. B. Curtis, of Mt. Vernon, which continued for nineteen years, when Mr. Scribner removed to Toledo and became associated with the late Frank H. Hurd. Prior to this Mr. Scribner had been elected a member of the Ohio Senate from the district comprising Holmes, Wayne, Knox and Morrow counties, and while there was chairman of the Judiciary Committee. In the Senate he introduced the Criminal Code prepared by Frank H. Hurd, his predecessor in the Senate and himself prepared the Municipal Code of the state. In the spring of 1873 he was elected a member of the Constitutional Convention. In the same year he was nominated for

Supreme Judge on the Democratic ticket, but was defeated by a small majority.

In November, 1887, Mr. Scribner was elected one of the Judges for the Lucas Circuit, in which position he continued till the time of his death.

While still practicing at Mt. Vernon Judge Scribner found time to write a two-volume work on the Law of Dower, which has taken a high rank among legal text books.

Judge Scribner was married October 20, 1847, to Miss Mary E. Morehouse, of Homer, Ohio, and was the father of four daughters and four sons, the eldest of whom became his business partner in 1871, and is still a well known member of the Toledo bar.

It is fitting that Judge Scribner's associates and successors at the bar should testify to the high character he displayed in his intercourse with them and acknowledge the value of the tradition which he leaves behind. The innate gentleness of the man, combined with the impress he received from the unusually able and distinguished lawyers with whom he practiced in the little city of Mt. Vernon, rendered Judge Scribner's manners as a practitioner well nigh ideal. He has been known to say to a young lawyer, "The bar is composed of the best fellows in the world—strain a point to keep their friendship." In the trial of cases he was not only fair and courteous to rival attorneys, but his manners to witnesses were as far removed as possible from the insulting, intimidating style, which, happily, we may now describe as a remnant of a past age. It was in consequence of this that one of the Common Pleas Judges was able to say that he did not recollect during all his career at the bar hearing a single word against Judge Scribner. The ethics of the profession he held in high esteem. He felt that their observance gave dignity and self-respect to the profession. He once lost an important case by refusing to permit a client to pay a man to tell the truth. In professional work he was extremely painstaking and laborious. The letterpress books of his office tell in this respect a surprising and pathetic story. In 1885 the common pleas court made a vigorous attempt to dispose of an accumulation of cases and

as a result Judge Scribner, then attorney for the Lake Shore and Michigan Southern Railway Company, was kept in court for several months at a stretch, trying one case after another. Yet the letter press reveals the fact that even during this extreme strain Judge Scribner actively oversaw other cases in which his firm was interested, conducted a large correspondence with his own hand, and personally copied his letters in the mute witness of his indomitable industry. The lamentable result of all this was a nervous collapse from which he never fully recovered. Judge Scribner, like his illustrious predecessor Chief Justice Waite, has left the bar a tradition and an influence for courtesy, for honor and for industry whose extent we easily overlook because we are accustomed to it. It is only by going among the bar of a neighboring county whose leaders during the past generation were men of low private morals and vulgar manners, that we are able to estimate the force of example in moulding the tone of a whole community.

The character which Judge Scribner displayed at the bar shone with equal lustre on the bench. A former circuit judge who once sat with Judge Scribner in another circuit has described the temper in which Judge Scribner performed his duties. When they took up a batch of cases for decision he said he felt unwell and asked the presiding judge to give him something easy. "Well," said the presiding judge, "Here is the case of — v. —. I guess we will all agree on that; the plaintiff's interpretation of the statute will not hold for a moment. Suppose you give the decision in that case." Judge Scribner assented and disappeared. An hour afterward he was found in the midst of a heap of books laboriously tracing the origin and modifications of a statute through successive legislatures. "Why, Judge," said the president, "I thought you wanted something easy. What are you doing?" Judge Scribner smiled and said, "Well, I felt as if I would like to convince the man that we have got to beat that he was wrong." Regretting no doubt that he had to decide against anybody, he was anxious to reconcile the defeated to the result by convincing him of his error.

Judge Scribner's political ideas lent a romantic tinge to this personality. While very little of a partisan in the sense of being always for everybody on his party ticket, his democratic principles were so deep-seated, so ingrained, so much a part of him that it is impossible to overlook this side of his character. Liberal in all things else, on principle he was firm as a rock. His political convictions gave his life that coloring of sentiment, that impersonal ideal, without which our lives are incomplete.

It is pleasing to know that the life of a man so immersed in work, so self-restrained and to whom so few relaxations came was exceptionally happy in its domestic relations. Many of us have been witness of the extraordinary devotion of which he was at once the recipient and giver. Thus if our friend's life, on the retrospect, seems a hard and grinding one, we may yet feel glad that he had the greatest of life's consolations.

After a life of intense and highly intelligent labor Judge Scribner died comparatively poor. He never held high political position, and his fame was circumscribed within comparatively narrow limits both in time and space. He attained no conspicuous eminence in wealth, fame or position. Yet must we not feel that his life will leave a larger inheritance than many who reach the highest rounds on the ladder of ambition? Must we not feel that his gentleness, his charity, his character leave behind a larger immortality than many of the most distinguished careers? We feel, we know that he has attained the poet's aspiration an immortality not made up of earthly renown, but living in the lives of other men:—

"May I reach

That purest Heaven, be to other souls  
The cup of strength in some great agony,  
Enkindle generous ardor, feed pure love,  
Beget the smiles that have no cruelty,  
Be the sweet presence of a good diffused  
And in diffusion ever more intense."

We therefore ask your Honors as a mark of respect for the departed jurist and as a slight expression of the great loss we have sustained in the death of Judge Scribner, that you order this memorial to be spread upon the records of this court, that a certified copy thereof

be sent to the widow and family of the deceased and this court be adjourned for the day.

L. H. PIKE.  
JAMES M. RITCHIE.  
THOMAS DUNLAP  
BARTON SMITH.  
C. S. ASHLEY.

### FIRST DEGREE MURDER.

[Seneca Common Pleas Court, December 27, 1895.]

THE STATE OF OHIO, v. LEONARD J. MILLER, *alias* LEVI J. MILLER, *alias* LEON J. MARTIN.

### CHARGE TO THE JURY.

Delivered by Judge Schaufelberger.  
[Concluded.]

On the part of the defendant, it was his duty, knowing, or having reason to believe, that Schultz and Sweeney were officers of the law in the discharge of their official duties, to yield himself immediately and peaceably into their custody. If they were officers of the law charged with the duty of taking the defendant into their custody, and the defendant knew them to be officers charged with that duty, then he could have no reasonable grounds for believing that he was in danger of death or great bodily harm.

So that upon the question of self defense, if you believe from a preponderance of the evidence and the circumstances proved, that the defendant did not know, or have reason to believe, that August Schultz and Patrick Sweeney were officers of the law in the discharge of their official duty, at the time and place of the homicide, and that he in the careful and proper use of such faculties as he had, believed, in good faith, that he was in imminent danger of death, or great bodily harm, and that his only means of escape consisted in taking the life of his assailants, and that, under the circumstances, he had reasonable grounds for such belief, then you would be warranted in finding that the killing was justifiable on the ground of self defense, although in fact the defendant may have been mistaken as to the existence or imminence of danger.

On the other hand, if you believe from the evidence and the circumstances proved that the defendant, at the time and place of the killing, knew, or had reason to believe, that Mr. Schultz and Mr. Sweeney were officers of the law charged with the duty of arresting him, and that, instead of yielding himself peaceably into their custody, he threatened and was prepared to resist arrest and declared that he would not be taken alive, and that one of the officers, August Schultz, while undertaking to disarm the defendant and place him under arrest, was by him killed, and that the defendant was not at the time insane to the extent of being irresponsible for his acts, as already explained to you, then the law holds him criminally responsible for the act done, and you would not be warranted in finding that the killing was justifiable on the ground of self defense.

Under the instructions given you by the court, your inquiries then should be, whether the defendant, Leonard J. Miller, *alias* Levi J. Miller, *alias* Leon J. Martin, within the county of Seneca and state of Ohio, killed August Shultz, at the time and in the manner and form as charged in the indictment; whether such killing was justifiable or excusable, or was felonious and criminal; whether at the time of such killing he was insane; and whether such killing was murder in the first degree, murder in the second degree, or manslaughter, as defined in the statutes.

You will remember that the identity of the defendant, as the person who committed the alleged crime, is one of the material facts contained in the indictment, as are also the alleged facts that such crime was committed in this county and state, and on the 23d day of October, A. D. 1895; and to justify a conviction in this case, you must not only be satisfied that the body of the crime charged was committed but you must also be satisfied beyond a reasonable doubt, that the defendant, Leonard J. Miller, *alias* Levi J. Miller, *alias* Leon J. Martin, who is here on trial, is the same person who is named in the indictment, and who committed the alleged crime, and that such crime was committed within the county of Seneca and state of Ohio, at the time stated in the indictment.

It is also incumbent on the state, to justify a conviction in this case, to show by the evidence, beyond a reasonable doubt, that August Schultz came to his death by reason of a pistol wound inflicted on him by the defendant; in other words, that the defendant killed him by shooting him with a pistol, or other fire-arm of like character. The wound must have been inflicted with a pistol, or similiar weapon, in the hand of the defendant, and must have been the immediate and efficient cause of death. And if you believe from the evidence, beyond a reasonable doubt, that the defendant, by shooting a leaden bullet from a pistol, or like weapon, inflicted a wound upon the left side of the chest of August Schultz, that such bullet penetrated his body, and the wound thereby made was in itself mortal, and reasonably calculated, from its nature and extent, to produce death, and that it did in fact contribute directly to his death, then, no matter how much or how little time elapsed between the inflicting of the wound and the death of Mr. Schultz, you will be justified in finding that the defendant killed August Schultz; otherwise, it will be your duty to acquit him.

If you find that the defendant did kill August Schultz, in manner and form as charged in the indictment, then you should inquire whether such killing was justifiable or excusable, as already defined to you, and whether the defendant, at the time of the killing was insane to the extent that he was not criminally responsible for the act, as has been explained to you. You will bear in mind that the burden of establishing the defense of insanity, as well as the defense that the killing was justifiable, rests upon the defendant, and that he must satisfy you by a preponderance of the evidence that he was insane, or of the existence of the facts which in law constitutes self-defense, before you will be warranted in finding, either that he was insane, or that he was justified in taking the life of Mr. Schultz on the ground of self-defense. If you believe from a preponderance of the evidence, under the instructions given you, that the killing of August Schultz was justifiable or excusable, on the part of the defendant, or that, at time of the killing, he was in-

sane to the extent of not being criminally responsible for the act, as has been explained to you, then in either of these cases, you will not be warranted in finding the defendant guilty.

But if you believe from the evidence, beyond a reasonable doubt, that the defendant, at the time and place, and in the manner and form charged in the indictment, killed August Schultz, and the defendant has failed to satisfy you by a preponderance of the evidence that such killing was justifiable or excusable, or that he was insane, then you will be warranted in finding that the killing was felonious and criminal, and it will be your duty to find the defendant guilty; and you should then inquire whether the crime was murder in the first degree, murder in the second degree, or manslaughter.

You will remember that the statute defines murder in the first degree as purposely, and of deliberate and premeditated malice, killing another; and murder in the second degree as purposely and maliciously, but without deliberate and premeditated malice, killing another; and manslaughter as unlawfully, but without deliberate and premeditated malice, and not purposely or maliciously, killing another.

Thus, if the killing was unlawful only, but without a purpose or intent to kill, and without deliberate and premeditated malice, the degree of crime is manslaughter; if the killing was unlawful and malicious and without a purpose and intent to kill, but without deliberate and premeditated malice, then the degree of crime is murder in the second degree; if all these elements were present, if the killing was unlawful and malicious, with deliberate and premeditated malice, and with a purpose and intent to kill, then the degree of crime is murder in the first degree; and in this case, if you find the defendant guilty, it will be your duty to say that you find him either guilty of manslaughter, or murder in the second degree, or murder in the first degree, according as the elements which constitute these respective degrees of homicidal crime, have been established by the evidence beyond a reasonable doubt.

Any killing of another that is not justifiable or excusable, and wherein the

slayer is not insane, is an unlawful killing within the meaning of the law.

Malice, within the meaning of the law, includes not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. In a case of homicide, it is not confined to particular ill will or animosity against the deceased, but is intended to denote the state of mind which prompts a conscious violation of the law to the prejudice of another. A thing done with a wicked mind and attended with such circumstances as plainly indicate a heart regardless of social duty and fully bent on mischief, indicates malice within the meaning of the law; and malice is implied in law from any willful and criminal act, unless the evidence shows that the accused was acting from some innocent or proper motive, or the act was the product of his insanity.

Upon the question of intent, the law presumes a man to intend the reasonable and natural consequences of any act deliberately done. The law presumes that every sane person contemplates and intends the natural, ordinary, and usual consequences of his own voluntary acts, unless the contrary appears from the evidence. If a man is shown by the evidence, beyond a reasonable doubt, to have killed another by any voluntary act, the natural and ordinary consequences of which would produce death, then it will be presumed that the death of the deceased was intended by the slayer, unless the facts and circumstances of the killing, as shown by the evidence, create a reasonable doubt as to whether the killing was done purposely or intentionally. An intent or purpose to kill must be present in the mind of the slayer at the time and place of the assault; and the assault must be made in the execution of that purpose, to be purposely killing within the meaning of the law, and the purpose or intent may be inferred from the facts and circumstances proved on the trial, from what was said and done by the accused, the manner of inflicting the wounds, the instrument used, and its tendency to destroy life. The intent need not be directed to the person killed. If the accused has formed a purpose to kill any person, and makes an assault in execution of that purpose,

but by mistake, or unintentionally, kills another person, than the one intended, the law holds him just as guilty as if the wound inflicted had taken effect upon the person for whom it was intended.

To constitute deliberate and premeditated malice, within the meaning of the law, the intention to kill must have been deliberated upon, and the design to do it formed before the act which resulted in death was done. If a person has actually formed the purpose maliciously to kill, and deliberated and premeditated upon it before he performs the act, he is guilty of purposely, and of deliberate and premeditated malice, killing another, however short the time may have been between the formation of the purpose to kill and its execution. It is not the time of deliberation and premeditation that is requisite, but the actual existence of the purpose, malice, deliberation and premeditation.

The person killed need not be specifically in the defendant's mind while the latter is forming the purpose to kill and deliberating and premeditating upon the killing. It is sufficient if the one killed is one of a class deliberated and premeditated upon against which the design and purpose to kill is directed.

So that in this case, if you believe from the evidence, beyond a reasonable doubt, that the defendant unlawfully, purposely and maliciously shot and killed August Schultz, as charged in the indictment, and that before, or at the time the fatal wound was given, the defendant had formed in his mind a willful, deliberate and premeditated design or purpose to take his life, or the life of any officer who might come to arrest him, and that the wound was inflicted in furtherance of that design or purpose, and without any justifiable cause, or legal excuse therefor, as explained in these instructions, then you are authorized to find that the defendant purposely and of deliberate and premeditated malice killed August Schultz.

In conclusion let me say to you, gentlemen, that under the instructions given you by the court, as to the law which is applicable to this case, and which must govern you in the determination of the questions involved, you should scrutinize and weigh with great care all the testi-

mony and the circumstances proved, and give the case calm, serious, impartial and just consideration; and then,

If the state has failed to satisfy each of you, by the evidence, beyond a reasonable doubt, that the defendant, on the 23d day of October, A. D. 1895, within the county of Seneca and state of Ohio, shot and killed August Schultz, in manner and form as charged in the indictment, or if the defendant has satisfied you, by a preponderance of the evidence, that such killing was justifiable or excusable, as explained to you, then, in either of these cases, you should acquit the defendant, and your verdict should be not guilty.

If you believe from the evidence that, at the time and place stated in the indictment, the defendant killed August Schultz, and if the defendant has satisfied you, by a preponderance of the evidence, that, at the time of such killing, he was insane to the extent that he was not criminally responsible for the act, as already explained to you, then your verdict should be not guilty because of insanity.

If the state has satisfied you by the evidence, beyond a reasonable doubt, that the defendant, at the time and place, and in manner and form charged in the indictment, did unlawfully kill August Schultz, but has failed to satisfy you, beyond a reasonable doubt, that such killing was done purposely, and of deliberate and premeditated malice, then your verdict should be guilty of manslaughter.

If the state has satisfied you, beyond a reasonable doubt, that the defendant, at the time and place, and in manner and form charged in the indictment, did unlawfully, purposely and maliciously kill August Schultz, but has failed to satisfy you, beyond such doubt, that such unlawfully killing was of deliberate and premeditated malice, then your verdict should be guilty of murder in the second degree.

If the state has satisfied each of you by the evidence, beyond a reasonable doubt, that on the 23d day of October A. D. 1895, in the county of Seneca and state of Ohio, the defendant did unlawfully, purposely, and of deliberate and premeditated malice, kill August Schultz

in the manner and by the means stated in the indictment, then your verdict should be guilty as he stands charged in the indictment, which means murder in the first degree.

And now, gentlemen, the case is with you. You all deserve special commendation from the court for the considerate manner in which you have conducted yourselves, and for the patience, care, and close attention manifested by you in listening to the testimony of witnesses and argument of counsel during the trial. It is now your duty to consider well the evidence, under the instructions given you by the court, and agree upon a verdict. You should perform that duty calmly and fearlessly. Your verdict is equally important to the state and to the defendant. Neither can ask it at the expense of the rights of the other. Into the deliberations upon which it is made up, there should enter neither vengeance, nor pity. It should proceed from your uncolored, dispassionate judgments. A vision clear to see, and a courage to pronounce the right thing, unmindful of favor or disappointment to any one, is the fine quality of a right-minded juror.

The following requests were given as modified and approved.

Request No. 2 as charged: "If the jury find from a preponderance of the evidence in the case that the defendant was in his own house, about 8:30 o'clock in the evening, after dark, and a man rapped at the front door of the house, and the defendant opened the door, and after some words of no violent character, the defendant refused the man outside admittance to the house and shut the door, and that the wife of the defendant, a few minutes later, opened the door, and the man outside the house and another entered and spoke to the defendant; and the two men took seats; and the defendant knew they were officers, and the defendant said, in substance, 'I will not be taken alive,' and the conversation continued there quietly for perhaps fifteen minutes, and the two men, or either of them, said to the defendant that they had not come to arrest him, that they did not want to take him and they did not notify or tell him they had a warrant for him, and he did not know that they had a warrant for his arrest,

and that while the officers were talking to him he was sitting on a chair in the corner of the room, about six or seven feet from the men with whom he had been talking, with a gun in his hands, or resting across his knees; and when his eyes were somewhat turned aside, one of them suddenly sprang upon him and seized his gun, and the other immediately came up and also seized it, and a scuffle or contest followed for the possession of the gun, and in the contest it was discharged. And about the time of the discharge of the gun another man rushed into the room from the outside and seized the defendant violently by his left arm with one hand, and with the other pushed his head aside as if to strike it against the wall, and while this contest was going on violently, the defendant drew a pistol he had on his person and fired; if this firing was done under the belief on his part that it was necessary, or if it appeared to him to be necessary, to save himself from death or great bodily harm, and if you find from the evidence that the defendant had reasonable grounds for such belief, and the death of August Schultz resulted from the firing of the pistol, the death thus caused would be excusable, and the defendant would not be guilty."

Request No. 3 as charged: "And further, if the jury shall find that the shooting was done under the circumstances above set forth, and in the contest for the possession of the gun as above set forth, and in the midst of that contest, and the circumstances did not justify the fear on his part of death or great bodily harm, but a less degree of fear, and in the excitement and confusion of the contest, he, without malice or a purpose to kill, fired the pistol, and that but for the contest of the gun so commenced and carried on the shooting would not have occurred; the defendant is guilty of manslaughter only."

Request No. 4 as charged: "Although the jury may be satisfied from the evidence that the defendant on the afternoon, in conversation with a neighbor, appeared violent and threatened violence to the officers and the whole community, and afterwards in an orderly, quiet and peaceable manner, transacted business and settled accounts with his neighbor,

and that in the evening when the officers came to his house he could have killed the officers, but did not do so, or attempt or threaten to do so, but sat down and talked with the officers in a peaceable and quiet manner, then the jury may believe him to have abandoned any purpose which he may have had or formed in the afternoon, and if the shooting was not done in pursuance of the settled purpose as indicated by his actions in the afternoon, but as the result of a sudden, unexpected and vigorous contest, of force for the possession of a gun in his hands, and was done solely in the excitement of that contest, these facts would strongly tend to prove that the act was not done with premeditation and deliberation, and without such premeditation and deliberation, the defendant would not be guilty of murder in the first degree. And further, if the killing was done under these circumstances, but without malice on the part of the defendant, in that case he would not be guilty of murder in the second degree."

Request No. 6 refused: "If the jury find that the defendant, at the time of the shooting and for some weeks or months before, was laboring under the delusion that the community was against him, that his Creator was against him, that his soul was lost, although he may have known right from wrong in the abstract, may have known it was wrong to commit burglary, or larceny, or arson, or take life, yet if these delusions so far dominated his mind and actions that he acted on them and was controlled by them, and the act he did was to any appreciable or considerable degree the product of them, he is not guilty."

Request No. 7 as charged: "The defense of insanity presented in this case is entitled to your full and impartial consideration. It is necessary for the defendant to establish the defense of insanity by a preponderance of the evidence. To the commission of the crime of murder in the first degree, mental capacity for deliberation and premeditation is essential. If the evidence shows that this essential capacity was probably wanting, or, if you believe from a preponderance of the evidence that the accused was insane when the homicide was committed, that at the time he was

actuated by insane delusions, then there may be reasonable and substantial doubt of his capacity for deliberation and premeditation. If the homicide was committed in a manner that would be criminal and unlawful if the accused were sane, the verdict should nevertheless be not guilty, if the killing was the offspring or product of mental disease in the defendant."

## SUPREME COURT OF OHIO.

### Official Record of Proceedings.

TUESDAY, March 9, 1897.

#### General Docket.

Causes to and including No. 4066, on the General Docket, are called and marked submitted. The next call will be to and including No. 4773.

4096. Eliza Heaton v. Eldridge & Higgins. Error to the circuit court of Franklin county.

WILLIAMS, J.

1. Contracts receive their sanction from the law of the place where they are executed and to be performed, and their interpretation is controlled by that law; but the remedy upon the contract will be administered according to the law of the place where the remedy is sought.

2. Section 4199, of the Revised Statutes, prescribes a rule of procedure to be observed by courts whose jurisdiction is invoked for the enforcement of contracts to which the statute relates; and the mode and measure of proof required by the statute is indispensable to the establishment of such agreements, wherever they may have been made.

3. An agreement which, by its terms, is not to be performed within one year from the time it was made, will not be enforced in this state, unless the agreement, or some memorandum or note thereof is in writing and signed by the party to be charged, or by some person authorized by him to sign it, although the agreement was made in another state or country where it was competent to prove the same by parol evidence.

Judgment of the circuit court reversed, and that of the common pleas affirmed.

5140. City of Cincinnati v. William Holmes Admr. et al. Error to the circuit court of Hamilton county.

MINSHALL, J.

1. Where the general provisions of a statute and those of a later one on the same subject are incompatible, the provisions of the latter statute must be read as an exception to the provisions of the earlier statute.

2. The provisions of section 2702, Revised Statutes, known as the Burn's law, do not apply

to the act passed May 4, 1891, (88 Laws, 527.) authorizing villages of a certain class to make certain street improvements, and defray the costs and expenses thereof by issuing bonds and levying taxes and assessments as therein provided; and, therefore, a contract made with the village for the performance of the work, before any of the money is in the treasury is not, for such reason, void.

Judgment reversed and common pleas affirmed.

3905. Guy Weber v. Shay & Cogan. Error to the circuit court of Warren county.

SHAUCK, J.

1. A contract by attorneys at law to render services to prevent the finding of an indictment against one accused or suspected of crime is illegal and void without respect to the belief of such attorneys as to his guilt, and compensation stipulated to be paid for such services cannot be recovered.

2. Such contract is illegal because of its corrupting tendency; and it should not be left to a jury to determine whether, in its execution, acts were done to contravene public morals or subvert the administration of justice.

Judgments of the circuit and common pleas courts reversed.

5385. E. E. Pearson, Auditor, et al. v. H. M. Stephens. Error to the circuit court of Miami county.

BRADBURY, J.

1. The act of April 21st, 1896, (92 O. L. 567), in as far as it prescribes and limits the compensation of certain county officers and their assistants therein named, the operation of which is expressly limited to Miami county, relates to a subject local in its nature, and therefore does not conflict with section 26 of Article 2 of the constitution of this state.

2. The system of compensation provided by the act is complete without reference to the penalties for official misconduct prescribed by section 13, or to the effect to be given to an official bond by section 14 of the act. Wherefore this system of compensation may be separated from, and executed independently of, those two sections, and is not affected by the question of the constitutionality of either or both of them.

Judgment reversed and cause dismissed.

BURKET, C. J. and SHAUCK, J., dissent.

4403. Valentine Fries v. The Wheeling & Lake Erie Railway Company. Error to the circuit court of Huron county.

SPEAR, J.

1. Where a railroad company has taken possession of land for its right of way, and incorporated it as part of its permanent railroad track, with the verbal consent of the owner, on condition of compensation verbally promised but refused and not performed, and without appropriation proceeding and without any agreement in writing with the owner, such owner has an election of remedies, either (1) to proceed in the probate court to compel appropriation under action 6448, Revised Statutes;

or, (2) by assenting to such possession by the company as an appropriation in fact, and tendering conveyance, to proceed in the court of common pleas to recover compensation.

2. Such proceeding for compensation cannot be enlarged to include an inquiry of damages to other lands; but the jurisdiction of the court of common pleas is not ousted by allegations of damages to other lands and prayer for recovery by reason thereof.

3. The proceeding to compel an appropriation is not barred by the lapse of less than twenty-one years from the time of such occupancy by the company.

4. Where such action for compensation is brought within twenty-one years from the time of such occupation, and the petition does not show that the election was made six years or more before the commencement of the action, it will not be subject to demurrer on the ground that the cause of action did not accrue within six years next before the action was begun.

Judgment reversed and cause remanded to the circuit court with direction to pass upon the remaining allegations of error.

4285. *Maggie B. Minnear v. Emma Holloway.* Error to the circuit court of Morrow county. **BURKET, C. J.**

1. When a higher court reverses the judgment of a lower court upon the ground that the verdict or judgment is not sustained by sufficient evidence, or is against the weight of the evidence, the cause must be remanded to the lower court for a new trial; but this does not apply to orders made on hearings on motions.

2. Where the controlling facts in a civil action are conceded by the parties in their pleadings or evidence, or both combined, without conflict as to any material fact, so that the error of the court lies in the application of the law to such facts, a higher court after reversing the judgment for such error of law, may proceed and render such judgment as the court below should have rendered upon such facts, or remand the cause to the court below for such judgment.

Judgment of reversal affirmed, and judgment on the merits reversed, and cause remanded for a new trial.

4155. *Samuel A. Cooper v. The Toledo & Ohio Central Ry. Co.* Error to the circuit court of Hancock county. Judgment affirmed.

4212. *The Wheeling & Lake Erie Ry. Co. v. Jacob Rehman.* Error to the circuit court of Medina county. Judgment affirmed on the authority of *Fries v. The Wheeling & Lake Erie Railway Co.*

4340. *The B. & O. S. W. R. R. Co. v. Frank Litter.* Error to the circuit court of Ross county. Dismissed by plaintiff in error at its costs and without record.

4119. *George W. Weiser v. The Broadway & Newburgh Street R. R. Co.* Error to the circuit court of Cuyahoga county. Judgment affirmed.

4427. *Fred. J. Graef v. Philip J. Gates.* Error to the circuit court of Miami county. Judgment affirmed.

4472. *Abraham Darling v. The Trustees of Monroe township, Richland county.* Error to the circuit court of Richland county. Judgment affirmed.

4483. *Joshua B. Owsley v. Clarence Murphy, Assignee, et al.* Error to the circuit court of Butler county. Judgment affirmed.

5135. *The Cleveland & Marietta Ry. Co. v. Alice T. Irwin, Admx.* Error to the circuit court of Guernsey county. Judgment affirmed.

5336. *James Reed et al. v. the State of Ohio ex rel. Thomas J. McDermott, etc.* Error to the circuit court of Muskingum county. Judgment affirmed.

#### Motion Docket.

2843. *W. R. Ryan et al. v. L. Dean Holden, Trustee.* Motion by defendant to dismiss cause No. 5370, on the general docket. Motion overruled.

2872. *Hannah Powell v. The State of Ohio.* Motion for leave to file a petition in error to the circuit court of Franklin county. Motion allowed and cause advanced.

2880. *James B. Gormley, Assignee v. E. J. Cunningham.* Motion by defendant to dismiss cause No. 4621, on the general docket. Motion overruled.

2881. *The Good Templar Lakeside Building Co. v. W. M. Filabaum et al.* Motion by defendant to dismiss cause No. 5294, on the general docket. Motion overruled.

2882. *William Haas v. The State of Ohio.* Motion for leave to file a petition in error to the circuit court of Hamilton county. Motion overruled.

2883. *The Superior Coal Company v. America Hollingsworth, Admr.* Motion by defendant to dismiss cause No. 2501, on the general docket. Motion allowed and cause dismissed.

TUESDAY, March 16, 1897.

#### General Docket.

4195. *The Gambrinus Stock Co. v. Catherine M. Cook et al.* Error to the circuit court of Hamilton county. Judgment affirmed.

4214. *William McFarlin et al., executors, etc. v. The Painesville National Bank et al.* Error to the circuit court of Summit county. Judgment of the circuit court as to statutory liability affirmed, and as to collection of stock subscriptions reversed, and cause remanded to the circuit court for further decree.

4236. *Grayson Dye v. Emma Beall.* Error to the circuit court of Miami county. Judgment affirmed.

4265. *The Cleveland, Lorain & Wheeling Railroad Company v. Koehnlein Bros.* Error

to the circuit court of Belmont county. Judgment affirmed.

4271. Franklin B. Daniels et al. v. Samuel Miller et al. Error to the circuit court of Medina county. Judgment affirmed.

4323. Clifford A. Neff, trustee, etc. v. Joseph Hackman, et al. Error to the circuit court of Cuyahoga county. Judgment affirmed.

4343. Mary E. Sturtevant v. Charles A. Sturtevant. Error to the circuit court of Lorain county. Dismissed by plaintiff in error.

4240. Abram C. Doney v. John F. Clark, Admr. Error to the circuit court of Franklin county. Dismissed by consent at costs of plaintiff in error.

4392. The East Harbor Sportsman Club v. Peter Kelting et al. Error to the circuit court of Ottawa county. Judgment affirmed. BRADBURY and SHAWCK, JJ., dissent from the judgment of affirmance on the cross-petition in error.

4450. Richard M. Parmley v. W. H. Crane et al. Error to the circuit court of Geauga county. Judgment affirmed on the authority of Mulvey v. King, 39 Ohio St., 491.

4469. The incorporated village of Union City v. Laura M. Gilkey. Error to the circuit court of Darke county. Judgment affirmed.

4492. The Farmers' National Bank of Findlay v. Albert Kestler et al. Error to the circuit court of Henry county. Judgment affirmed.

4497. Lydia Miles v. the Mechanics' Building and Loan Company. Error to the circuit court of Richland county. Judgment affirmed.

4520. John F. Clark, Admr., v. Abram C. Doney. Error to the circuit court of Franklin county. Dismissed by consent at costs of defendant in error.

#### Cases Dismissed

The following causes on the general docket have been dismissed for want of preparation:

4569. Joseph Keip v. The Leland Smith Co. Error to the circuit court of Lucas county.

4573. John Gallagher v. John Q. Adams. Error to the circuit court of Mahoning county.

4578. John W. Kreitzer, assignee, v. Margaret A. Bellaw. Error to the circuit court of Montgomery county.

4605. Rezin B. Wasson v. The Leader Printing Company. Error to the circuit court of Cuyahoga county.

4606. Rezin B. Wasson v. The Plain Dealer Publishing Company. Error to the circuit court of Cuyahoga county.

4607. The city of Cleveland et al. v. V. T. Palmer et al. Error to the circuit court of Cuyahoga county.

4610. Charles R. Messenger et al. v. The Second National Bank of Toledo. Error to the circuit court of Lucas county.

4624. The T. & O. C. Ry. Co. v. Dages, Andrews Co. Error to the circuit court of Franklin county.

4625. The T. & O. C. Ry. Co. v. Daniel S. Ambach & Co. Error to the circuit court of Franklin county.

4626. Jason Blackford v. Thomas E. Beery et al. Error to the circuit court of Wyandot county.

4636. James M. Hole v. The Salem Electric Railway Company. Error to the circuit court of Columbiana county.

4639. Isaac W. Walker et al. v. Charles R. Messenger et al. Error to the circuit court of Lucas county.

4640. R. Meier & Co. v. Charles R. Messenger et al. Error to the circuit court of Lucas county.

4646. W. E. Furlong v. A. F. Emley. Error to the circuit court of Warren county.

4647. S. B. Woodward v. A. F. Enley. Error to the circuit court of Warren county.

4658. Noah Aarons et al. v. Clafflin, Larrabee & Co. Error to the circuit court of Richland county.

4659. The B. & O. and Chicago Railroad Company v. Margaret Vogel, executrix. Error to the circuit court of Henry county.

#### Motion Docket.

2634. Charles D. Campbell, Auditor v. The State of Ohio ex rel., F. C. Hamilton, treasurer. Motion by plaintiff to advance cause No. 5474, on the general docket. Motion allowed and cause advanced. Briefs to be filed within rule.

2885. Albert J. Lutman et al. v. The L. S. & M. S. Ry. Co. Motion by plaintiff to advance cause No. 5224, on the general docket. Motion allowed and cause advanced. Briefs to be filed within rule.

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The state senatorial bribery cases have all been nolleed by Judge Evans of the Franklin common pleas upon the suggestion of prosecuting attorney Dyer. The defendants in these cases were ex-Senators George Iden, of Newark; John Q. Abbott, of McConnellsville; L. C. Ohl, of Youngstown; William C. Gear, formerly of Upper Sandusky, and John L. Geyer, of Columbus, formerly of Van Wert. The above were all member of the legislature in 1894 and the indictments charging them with bribery were found in January 1896. Iden and Abbott were each tried and found guilty in the Franklin court of common pleas, but the verdict had however, been set aside by the circuit court of that county and a new trial granted. In view of this decision the cases were all nolleed upon the belief that the defendants could not be convicted.

## A WISE MAN.

"I desire to make my will in a very few words," said the dying merchant to his lawyer, "so you can take down what I want to say in three minutes. Are you ready?"

"Ready," answered the lawyer.

"I wish," continued the merchant, "to leave all my property, real and personal, without condition to John Jummel, attorney-at-law."

"What!" exclaimed the lawyer, jumping up and dropping the pen in his excitement. "You wish to leave all your property to me? Ah, you are joking, Mr. Brown. Ha! Ha! The idea of leaving it to me when I know how devoted you are to your three children. You always were a wag, Mr. Brown."

"There is no joke about this," said the sick man gravely. "As you say, I am devoted to my children, and it is for that very reason that I make the will I have dictated."

"I do not understand," said the amazed lawyer.

"I do," the merchant continued. "I know that if I made any other kind of a will there would be a contest and my property would go to you anyhow by the time the fight ended. In that event you would not consider yourself under

any obligation to do anything for my children, as you would have worked for the property'. But if I hand it all over to you by will, thus avoiding the trouble and expense of litigation, you may feel grateful to me and give a small part of my fortune to the little ones. Will you promise to see that they do not starve?"

"I will," answered the lawyer.

And the merchant passed away peacefully.

#### **LIBEL—PRIVILEGED COMMUNICATIONS.**

In the case of *Mary D. Nolan v. Michael Kane*, which was a suit for damages for libel, the allegation being that the defendant sent in a communication to the school board of Cincinnati, signed by himself and eighteen other "citizens and taxpayers, in which the opinion was expressed that the usefulness of the plaintiff and her sister, Mollie, as teachers in the public schools has been destroyed by a hearing before a committee of the school board resulting in their conviction of unlady-like conduct. Judge Wilson, of the common pleas court, heard the case below, and directed a verdict for the defendant.

In an opinion filed by Judge Swing, of the Hamilton circuit court, it is held that the communication was in its nature a privileged one. It is not only the right but the duty of a citizen to communicate to the appointing power whatever he knows, for good or ill, concerning one who is an applicant for a position as teacher, and if a citizen acts in such a matter in good faith he is protected, even though the statements made in the communication be untrue. In order to create liability it is not only necessary to show the falsity of such utterances, but that they were made from malice. If either of these elements is lacking there can be no recovery. Moreover the communication in question does not charge that the plaintiff had been guilty of unlady-like conduct. On the contrary, it expresses the opinion that her usefulness as a teacher had been destroyed because of her conviction of unlady-like conduct upon the evidence of ten or fifteen witnesses. There was no attempt at the trial below to show

that there had not been such a hearing and conviction, and the court properly directed a verdict for the defendant.

*John W. Herron and Price J. Jones*, for Plaintiff in Error.

*Thos. McDougall and A. C. Cassall*, Contra.

#### **REQUESTS SUBJECT TO COLLATERAL INHERITANCE TAX.**

By the will of Wm. Hooper, of Cincinnati, \$100,000 was bequeathed to Douglas B. and Wm. G. Twombly, stepsons of deceased; \$5,000 to Mrs. Abbe, of Washington, D. C., after the death of decedent's widow; \$160,000 to charitable institutions; 100 shares of P. Ft. W. & C. Ry. stock, valued at \$14,000, to Charles P. Geddes, and certain debts due to deceased from Frank A. Lee, one of the executors and trustees under the will, are released in consideration of services to be rendered to the estate, and in lieu of statutory compensation.

On behalf of the estate it was claimed in argument before Judge Ferris that in addition to excluding the exemption of \$200 to each legatee, the amount of the tax due from such person is to be deducted, and the amount payable computed upon the balance. It was shown that the deceased had issue of his body living at his death, and that he died within two months after making the will. Judge Ferris held—

First—That the legacies to the stepsons are taxable.

Second—That the devise to Mrs. Abbe is contingent, and that the taxing of her interest is deferred until the death of the widow.

Third—That as the deceased died leaving issue, and within a year after making the will, the bequests to charities are void under section 5915, R. S.

Fourth—That the bequest to Geddes is taxable.

Fifth—That the court cannot say that the debts released to Lee would give him more than a reasonable allowance, and the excess over the statutory allowance is not taxable.

Sixth—That the tax is payable upon the value of the legacy, less the \$200 exemption, and that the amount of the

tax is not to be deducted from the legacy and the tax computed upon the balance. *Thomas McDougall*, for the Executor; *Thomas H. Darby*, for the State.

#### TAXATION OF OHIO MORTGAGES.

Judge Sage of the United States circuit court filed an opinion sustaining the exception for insufficiency of John V. Jack to the answer in the suit brought against him by the auditor of Warren county for the recovery of taxes for the years 1889 to 1894 inclusive, on \$297,794, moneys and credits, with a penalty added of \$148,000, making a total of nearly half a million. The complainant is a nonresident, and the property which it is sought to subject to taxation, is in the form of loans on real estate in Warren county, which, it was alleged, were made through complainant's agent, under authority to invest, loan and control the funds placed in his hands.

The question presented to the court for decision was whether the debts owned by this nonresident of the state, evidenced by notes and mortgages upon realty within the state, are taxable in the state by reason of the control of complainant's agent, who was during the years in question a resident of the state and of the county in which it is sought to impose the tax.

Judge Sage held that no extent of authority or power of control given to an agent in the state could divest the principal's ownership of the subject matter of the agency. Therefore the fact, if it be a fact, that the agent made the investments for his principal and controlled the course of the transactions relating thereto, could not operate to bring the principal, a nonresident, within the jurisdiction of a law of the state relating to taxation. These mortgages are mere choses in action, and intangible, and have no *situs* apart from the residence of the owner. A tax upon them would be a personal tax, which a state can impose only upon its own citizens. They might be secured upon property in several different counties or in every county of the state, in which case a tax thus imposed might be collected several times or an

aggregate of taxes levied for a single year which would equal the principal of the debt. Mortgages and notes in the hands of an agent, as in this case, are no more taxable than they would be if placed in the hands of an attorney for collection.

A daily journal having a circulation of about 3,000 copies among judges, lawyers, bankers, collection and commercial agencies, real estate dealers, merchants, and other professional and business men, and which is kept on sale at public news stands, although devoted primarily to legal matters, but publishing proceedings of a board of public works, records of deeds, mortgages, liens, assessments and sheriff's sales, as well as quotations of local securities, railroad time-tables and one or more columns of general news, is held in the case of *Lynn v. Allen*, (Md.), 33 L. R. A. 779, to constitute a "newspaper of general circulation" for the publication of legal notices.

#### EMPLOYMENT OF MINORS.

The right to employ a minor in a hazardous position without the consent of his parents was decided last week by the circuit court of Hamilton county, in the case of *The P. C. C. & St. L. Ry. Co., v. Patrick McLaughlin*, which was an action brought by a father for damages on account of injuries to his son, a minor, while in the employ of the company as a brakeman, on the ground that the company was negligent in employing a minor in so dangerous a capacity without the consent of his father. The testimony was to the effect that when the young man was first employed by the company, in 1891, his father protested on the ground that he was a minor, and he was thereupon dismissed by the company from its service.

In 1893 he again applied for employment which was given him. He was fully grown and stated he was of age. At the trial of the suit below, the court refused to give a special charge to the effect that the company, having good reasons to believe from the appearance, conduct and statements of the young man that he was of age, was not liable

to the father on account of his injuries, because of the father's statement two years before that he was not of age. The jury returned a verdict for the father assessing his damages at \$500.

In an opinion filed Saturday of last week, by Judge Smith, of the circuit court, it was held that this special charge should have been given, and also another special charge to the effect that the company was not required as a matter of law to inquire of the plaintiff whether his son had reached his majority. The reviewing court says, "It was the duty of the defendant company towards this plaintiff to use reasonable care to ascertain the age of his son before putting him into a dangerous position or occupation. But we know of no principle of law or any adjudication of court which goes so far as to make it essential and necessary that inquiry should be made of a father as to the age of his son. It is manifest that a very high degree of care as to this might have been shown without any such inquiry of the father."

Judgment reversed.

*Ramsey, Maxwell & Ramsey*, for the railroad company.

*Peck & Shaffer*, for McLaughlin.

#### REPLEVIN OF STOLEN MONEY.

[Magistrates Court, Cincinnati Township, December, 1896.]

LAVINA PRICE v. JOHN C. SCHWARTZ,  
PROS. ATTY.

Question of title to money which had been stolen and paid by the thief to an innocent party in the ordinary course of business.

KUSHMAN, J. P.

The \$100 bill was stolen from Lavina Price by Mollie Lewis, who paid a freight bill of \$4 to the Little Miami Railroad Company, receiving \$96 in change, which she got away with before being arrested. The police traced the bill to the railroad company, and got it from them to use as evidence. Three or four days afterwards the railroad company wanted to balance their accounts, and called on the police department, who refused to turn over the bill, saying they were holding it as evidence. The

railroad company called upon Mayor Caldwell, who ordered police court clerk Bender to pay out of city funds \$100 in currency in place of the bill, which was done. The Lewis woman was convicted in the common pleas court and received two years in the penitentiary.

After she had been convicted, the Price woman, through attorney Sparks, swore out a writ of replevin against Prosecutor Schwartz, in whose hands the bill then was, having been used as evidence. The case came on for hearing. Frank M. Coppock, appearing at the request of prosecutor Schwartz, moved the court to make the city of Cincinnati a party defendant, as it was the real party in interest. Mr. Sparks objected, and the objection was overruled and exception taken.

There was no dispute as to the facts. Mr. Coppock claimed that the railroad company, having come into possession of the bill in the usual course of business, was in the position of an innocent purchaser of a negotiable instrument, and the courts have held that an innocent purchaser of a negotiable instrument acquires title to the same. If the railroad company had acquired title the city had also. Mr. Sparks claimed that the city of Cincinnati paid \$100 in place of the bill, with its eyes open, knowing at the time it was stolen property.

The court said that while he was sorry for the Price woman, and it was hard for her to be the loser, he must hold that the law and common sense were against her. Would any sensible man say that a business man would have to ask a purchaser, in the ordinary course of business, when he was presented with a bill: Where did you get it? Is it stolen? The court thought not, and as there was no question that the railroad company came into possession of the \$100 bill in the usual course of business, they had a good title to it; and if they had a good title, they had a right to give it to the city, or exchange it, as was done, or burn it if they felt so disposed.

The court finds that the city of Cincinnati was entitled to the possession of the \$100 bill at the commencement of the action, fixes the damage at one cent and the value of the goods at \$100.

Notice of appeal was given.

**NO GUILT WITHOUT INTENT.**

During the trial of a case in Chicago, Illinois, recently of a person accused of wife murder, who, when first arraigned entered a plea of not guilty and was then tried by a jury of twelve men. The evidence for the defense was that the defendant was crazy drunk when he killed the woman. The jury disagreed. On the second arraignment, defendant's lawyers entered a plea of guilty and submitted the case to the court and offered evidence of insanity at the time of the killing—just as it had been adduced in the first case on a "not guilty" plea. This strange phase of practice, said to be by no means unusual, raises the question of a prisoner's rights subsequent to sentence on such a showing. *The Evening Post*, of Chicago, has interviewed a number of lawyers in that city regarding this matter, and following is an opinion written by John F. Geeting, one of the most careful students of the law to be found in the practice in Chicago:

"The receiving of qualified pleas of guilty in criminal cases is not consistent with either the spirit of the common law or of the law as declared by this state. The thirty-ninth provision of the Magna Charta granted by King John at Runnymede, June 15, 1215, provided as follows:

No freeman shall be taken or imprisoned or disseised or outlawed or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land.

"It has, therefore, been the recognized rule in England that in felony cases all disputed questions must be submitted to a jury of twelve men, and that only upon a verdict of a jury can a freeman be convicted. This doctrine was brought across the Atlantic by the settlers of Jamestown and became a part of the common law of the Colony of Virginia, and by it was transmitted to the northwestern territory, out of which was formed the state of Illinois.

"It is true that where a defendant in open court enters a plea of guilty, that is, an unqualified admission of guilt, there is no issue to be tried, and the judge hears the testimony to aid him in fixing the penalty. Our statute defines a crime thus:

A criminal offense consists in a violation of a public law, in the commission of which there shall be a union or joint operation of act and intention, or criminal negligence.

"It is, therefore, not sufficient to constitute a plea of guilty that the defendant admits the commission of the act, but denies that there was any intention to do wrong, such as stating that he committed the act, but at the time was insane and totally irresponsible, for the denial of a criminal intent is as much a plea of not guilty as the denial of the commission of the act, as no crime is complete without the union of both act and intent.

"It is true that in some of the lower grades of crimes the defendant can waive a trial by jury and submit to a trial upon a plea of not guilty by the judge, but no such waiver is recognized by the law in felony trials. A few years ago a defendant accused of felony waived a jury trial, was tried by Judge Williamson in the criminal court and sentenced to the penitentiary. A petition for habeas corpus was presented to Judge McAllister, who decided that the proceedings were void and set the prisoner at liberty. This decision was cited and approved by our supreme court in the case of *Harris v. The People*, 128 Ill., page 585, in which case the supreme court held that a judge had no power to try a felony case without the intervention of a jury.

"It is, therefore, the declared law of this state that upon the charge of felony, where the defendant by plea of not guilty denies guilt, the judge cannot, even with the defendant's consent, try the case without a jury. And this being the law, the judge may only pass sentence in a felony case either upon a verdict of guilty rendered by a jury or upon an unqualified admission of guilt made in open court, where the defendant, by his plea of guilty, admits that he committed the act with the criminal intent charged in the indictment.

"If it is illegal for a judge without a jury to try a felony charge with the consent of the defendant, it is not only illegal, but reprehensible, for a judge to receive a plea of guilty when, in fact, the defendant denies the guilt, for in the latter case the defendant would lose the benefits of an appeal.

"The life and liberty of the citizen are by law regarded too sacred to be placed in jeopardy and made to depend upon the judgment of one man, be he ever so conscientious or learned."

#### CONTEMPT OF COURT.

An unusual and interesting proceeding in contempt was called in Judge Lamson's court of the Cuyahoga common pleas last Saturday and decided Tuesday of this week. The proceeding is a precedent which will have great bearing on the freedom of speech and press in so far as criticism of judges is concerned. The attachment for the alleged contempt was issued for Louis F. Post, editor of a morning daily recently started in the city of Cleveland, and was made at the instigation of Judge Lamson. The cause of the attachment was an editorial which appeared in the above mentioned paper, somewhat criticising the action of judges in their dealing with lawyers in the manner of calling cases without consulting the convenience of lawyers.

The substance of the charge against Mr. Post was that he had written and caused to be published an article relating to the affairs of the court of common pleas, in which he made personal allusion to the habits and authority of one of the judges, detrimental to the welfare of the court. After the conclusion of the proceedings in contempt the judge rendered his decision which was very lengthy, taking over an hour in which to deliver it. At the conclusion of the decision the judge sentenced the defendant to ten days in the county jail and fined him \$200 and the costs of this action, the defendant to stand committed until the fine and costs are paid. An appeal from this decision was taken to the circuit court.

Judge Lamson in rendering his decision said in part as follows:

"This proceeding against the defendant, Louis F. Post, is brought under section 5639 of the Revised Statutes of the state of Ohio, which provides as follows: A court or judge at chambers may punish summarily a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice."

"Proceedings of this kind necessarily are more or less embarrassing to a judge presiding in them. Their rarity is a guaranty that the judges in the exercise of this summary process are exceedingly cautious, and however unpleasant it may be to me, part of this opinion of the court should be addressed to this article as to its character, as to its nature, as to its tendency. It is true, the court said, that it did not care to hear argument upon the subject matter, but when the court reached out by summary process and called the defendant whether a member of the bar or a member of the community, and had called him to account for utterances which tended to impede and embarrass the administration of justice; that tribunal by that act necessarily prejudged the article and its character. Otherwise it would have no right to issue this process—otherwise its process would be an abuse of its judicial power. Further this course is sustained by the authorities and for a very wise and proper purpose. Proceedings of this kind tend to temper and excitement; tend to arouse hostility and prejudice for and against. As to this matter I need cite no evidence. It then becomes of the utmost importance that proceedings of this character should be so conducted as to relieve them as much as possible of these not only embarrassing but injurious features.

"As the supreme court has said, the defendant in writing and publishing this article under the facts admitted in this case, under the circumstances of the case, did it in the same manner as if he were present in the court, and in the hearing of the court had uttered the language of this article orally to the court itself. Would a judge for a moment stop under those circumstances when he had arrested the attention of the party and called his attention to the matter complained of, would he for a moment stop and hear an argument from the person thus arrested, as to whether or not the language which he had thus used in his presence was contemptuous or not? Would he for a moment stop and hear the party defending upon the proposition, whether or not the charge that a judge upon the bench in the trial of a

case was a judicial autocrat, governed by his own whims and by his own temper, and by his own uncontrolled will and not by the law of the land and his oath to administer the law as he understands it, to be impartial between the parties in the case? Any judge would sacrifice all self-respect that he possessed and the confidence of the entire community who would stop for a moment under such circumstances and hear one word of language or argument upon that proposition.

"If this attack can be made upon the court in this instance it can be made upon the court in every case that is tried before the court in this community. It is only necessary for the court to call the attention of right thinking and right constituted people to these things and the dangers that are incident thereto to have them acquiesce to every utterance that the court makes."

#### SUPREME COURT OF OHIO.

##### Official Record of Proceedings.

COLUMBUS, O., *March 23.*

##### General Docket.

4221. *George L. Converse v. Henry J. Booth et al.* Error to the circuit court of Franklin county. Judgment affirmed. Shauck, J., not sitting.

4253. *The Western Insurance Company of Toronto v. George H. Bennett et al., partners, etc.* Error to the superior court of Cincinnati. Judgment affirmed.

4277. *James Zimmerman v. Joseph Hidy, assignee, et al.* Error to the circuit court of Fayette county. Judgment affirmed.

4302. *Patrick Kearns v. John W. Pearson, executor, etc.* Error to the circuit court of Clark county. Judgment affirmed.

4303. *William C. Armstrong et al. v. Henry L. Tatum et al.* Error to the circuit court of Clark county. Judgment affirmed.

4307. *The Connecticut Fire Insurance Company of Hartford v. George H. Bennett et al.* Error to the superior court of Cincinnati. Judgment affirmed.

4347. *The Castalia Sporting Club et al. v. the Castalia Trout Club Company.* Error to the circuit court of Erie county. Judgment affirmed. Minshall, J., dissents.

4394. *H. D. Huston v. Albert T. Sauger et al.* Error to the circuit court of Cuyahoga county. Judgment affirmed.

4410. *Hiram S. Stockman v. John Stockman.* Error to the circuit court of Ashland county. Judgment affirmed.

4425. *Victor Lustila v. the State of Ohio.* Error to the circuit court of Lake county. Dismissed by plaintiff in error.

4493. *Elizabeth Fuher v. Charles Vilwock et al.* Error to the circuit court of Lucas county. Judgment affirmed. Minshall, J., dissents.

4499. *D. Shannahan et al., partners, v. Amos B. Cole.* Error to the circuit court of Scioto county. Judgment of the circuit court reversed and judgment of the court of common pleas affirmed.

4500. *John Hersh et al. v. The Commissioners of Putnam county et al.* Error to the circuit court of Putnam county. Judgment affirmed.

4502. *L. M. Ludwig, receiver, v. the R. Rothschilds Sons & Co. et al.* Error to the circuit court of Putnam county. Judgment reversed and cause remanded.

4505. *The State of Ohio ex rel. Noah F. Barnes et al., trustees, v. John W. Crawford et al., trustees of Congress township.* Error to the circuit court of Morrow county. Judgment affirmed.

4508. *William M. Bell, Jr., Auditor of Licking county, v. The State of Ohio ex rel. Allen B. Coffmann.* Error to the circuit court of Licking county. Judgment affirmed.

4510. *Philip E. Blesch et al. v. De Witt C. Jones et al.* Error to the circuit court of Franklin county. Judgment affirmed.

4511. *The Board of Directors of Wittenberg College v. Lawrence Goodman, executor.* Error to the circuit court of Hancock county. Judgment of the circuit court reversed and that of the common pleas affirmed on the authority of *Irwin, administrator, v. Lombard University*, 37 W. L. B., 157.

4526. *The Board of Commissioners of Adams county et al. v. John Kimerly.* Error to the circuit court of Adams county. Judgment affirmed.

4528. *Halliday Hay Company v. Christopher Grubb.* Error to the circuit court of Union county. Judgment affirmed.

4529. *Halliday Hay Company v. Lester W. Kline.* Error to the circuit court of Union county. Judgment affirmed.

4965. *The Cincinnati Hamilton & Dayton Railroad Company v. Samuel N. Aller.* Error to the circuit court of Lucas county. Judgment reversed and cause remanded for a new trial for reasons stated in journal entry.

4999. *Charles Cheseldine et al. v. John J. Chester, trustee.* Error to the circuit court of Franklin county. Dismissed by consent of parties at cost of plaintiffs in error.

5113. *The L. Schreiber & Sons Co. v. Sarah Roache, administratrix.* Error to the superior court of Cincinnati. Judgment affirmed.

5136. *Franklin Alter, etc., v. the City of Cincinnati et al.* Error to the circuit court of Hamilton county. Judgment affirmed.

### Motion Docket.

2886. James Andrews et al. executors, v. Robert C. Finley et al. Motion by plaintiff for extension of time to print record in cause No. 5368 on the general docket. Motion allowed and time extended to April 10, 1897.

2887. Speyer & Co. v. Margaret Baker. Motion by plaintiff to advance cause No. 5249 on the general docket. Motion overruled. Oral argument noted.

2888. A. W. Kennon, trustee, v. William Jones. Motion by defendant to advance cause No. 5387 on the general docket. Motion overruled.

2889. The State of Ohio v. Robert Groenland. Motion for leave to file a bill of exceptions to the circuit court of Hamilton county. Motion allowed.

2890. Julia C. Masten v. The Village of Norwood et al. Motion by plaintiff for temporary restraining order in cause No. 5484 on the general docket. Motion allowed and bond fixed at \$500 conditioned according to law, and to be approved by the clerk of the court of common pleas of Hamilton county.

2891. The Miami Valley Railway Company v. Clarence Devol, by etc. Motion by defendants to advance cause No. 5410 on the general docket. Motion allowed and cause advanced. Briefs to be filed within rules.

2892. George W. Collett, treasurer, v. The Springfield Savings Society. Motion by plaintiff to advance cause No. 5454 on the general docket. Motion allowed and request for oral argument noted.

2893. The State of Ohio ex rel. F. S. Monnett, Attorney-General, v. James P. Seward et al. Motion by defendant to dismiss cause No. 5037 on the general docket. Motion allowed by consent of parties.

### New Cases.

New cases filed in the supreme court since March 10, 1897:

5482. Marietta Jeffreys v. Benjamin Yoxthimer et al. Error to the circuit court of Medina county. George Hayden and G. W. Lewis, for plaintiff. Barnard & Richards, or defendants.

5483. Patrick Heeney v. Mary Kilbane. Error to the circuit court of Cuyahoga county. Foran & Dawley, for plaintiff. Kerruish Chapman & Kurruish, for defendant.

5484. Julia C. Masten v. The Village of Norwood et al. Error to the circuit court of Hamilton county. Richard Hingson, for plaintiff. W. E. Bundy and Rendigs. Foraker & Dinsmore, for defendants.

5485. Richard Wagner v. The City of Canton. Error to the circuit court of Stark county. C. C. Bon and Nat. C. McLeland, for plaintiff. H. B. Webber, for defendant in error.

5486. E. B. Robbins et al., partners, v. Klin Lichtinalder & Co. et al. Error to the circuit court of Logan county. Powell & Minahan, for plaintiffs.

5487. L. Miller et al. v. Solomon Albright. Error to the circuit court of Paulding county. Snook & Wilcox, for plaintiffs. H. C. Glenn, for defendant.

5488. Josephine Brichtoldt v. M. F. Fisher, Admr. Error to the circuit court of Defiance county. Enos & Johnston, for plaintiff.

5489. The State of Ohio ex rel. Attorney-General v. The Royal Insurance Co. of Liverpool. Quo warranto. F. S. Monnett, Attorney-General, for plaintiff.

5490. The State of Ohio ex rel. Attorney-General v. The Liverpool & London & Globe Insurance Company of Liverpool. Quo warranto. F. S. Monnett, Attorney-General, for plaintiff.

5491. The State of Ohio ex rel. Attorney-General v. The London & Lancaster Insurance Co. of Liverpool. Quo Warranto. F. S. Monnett, Attorney General, for plaintiff.

5492. The State of Ohio ex rel. Attorney-General v. The North British & Mercantile Insurance Co. of London and Edinburgh. Quo warranto. F. S. Monnett, Attorney-General, for plaintiff.

5493. The State of Ohio ex rel. Attorney-General v. The Calidonian Insurance Co. of Edinburgh. Quo warranto. F. S. Monnett, Attorney-General, for plaintiff.

5494. The State of Ohio ex rel. Attorney-General v. The British America Assurance Co. of Toronto. Quo warranto. F. S. Monnett, Attorney-General, for plaintiff.

5495. The State of Ohio ex rel. Attorney-General v. The Western Assurance Co. of Toronto. Quo warranto. F. S. Monnett, Attorney-General, for plaintiff.

New cases filed in the supreme court since March 17, 1897:

5496. The State of Ohio ex rel. Jason D. Hewitt, a taxpayer, v. Frederick Bader et al., commissioners. Error to the circuit court of Hamilton county. Jones & James, for plaintiff. Rendigs, Foraker & Dinsmore, for defendants.

5497. J. H. Shouhoft, President et al. v. The State of Ohio ex rel. Aloysius Soumentag et al. Error to the circuit court of Hamilton county. Carr & Spencer, for plaintiffs. Louis G. Hummel, for defendants.

5498. The County Commissioner of Clinton county, Ohio, v. James A. Craig. Error to the circuit court of Clinton county. W. H. Hartman and Smith & Savage, for plaintiffs. Mills & Clevenger, for defendant.

5499. Herbert Byard v. The B. & O. S. W. R. Co. Error to the circuit court of Athens county. D. L. Sleeper, E. D. Sayer & O. E. Davis, for plaintiff in error. Jewett & Wood, for defendant.

5500. Joseph Powlowski v. Ignatz Tarkowski et al. Error to the circuit court of Cuyahoga county. W. A. Babcock, Nowak & Moore, for plaintiff. Skeels & Baker, for defendants.

5501. I. J. Miller et al. v. Michael Ryan et al. Error to the circuit court of Hamilton county. S. A. Miller & Gustav Tafel, for plaintiffs. Thomas McDougal, for defendants.

# Ohio Legal News.

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## OHIO STATE REPORTS.

Volume 54, **Ohio State Reports**, is now ready for delivery, and may be obtained at \$1.50 per volume, payable in advance.

Owing to the death of Hon. Jacob Scroggs of the firm of Scroggs and Scroggs, of Bucyrus; C. J. Scroggs, the surviving partner has associated with him Mr. W. L. Monnett, manager of the collection department in the old firm, and on and after April 1, the firm name will be known as **Scroggs & Monnett**.

The conclusiveness of a decision upon prior appeal is denied in *Hastings v. Foxworthy*, (Neb.), 34 L. R. A., 321, where in another case between the two appeals the first decision had been overruled. The court adopts the rule that its rulings on an appeal may be questioned, and they need not to be followed if incorrect.

The liability of a steamboat company with respect to the property of its passengers is analogous to that of an innkeeper, and it will therefore be liable, without proof of negligence, if money for traveling expenses, carried by a passenger on a steamboat, is stolen from his stateroom at night, without negligence on his part. *Adams v. New Jersey Steamboat Co.*, (Court of Appeals of N. Y.), 45 N. E. Rep., 369.

A person riding between the rails of an electric street railway upon a bicycle is held in *Everett v. Los Angeles Consol. Elec. Ry. Co.* (Cal.), 34 L. R. A., 350, to be chargeable with the duty of looking out for and endeavoring to avoid danger from the electric cars; and the motorman seeing him is held entitled to assume up to the last moment that the rider will turn out of the way by increasing his speed or turning aside to avoid the danger.

The right to the good will of a partnership is held in *Philbrook v. Newman* (Cal.), 34 L. R. A., 265, to belong to the surviving partners upon their purchase of the interest of the deceased under a provision of the articles of association giving them such right, with the privilege of continuing the business under the firm name.

The beneficiary in a life insurance policy procured with stolen moneys is not an innocent third person as against the person from whom the moneys were stolen, but takes the policy subject to the means by which it was procured; and when the premiums on a policy are paid with stolen moneys, and the amount of the thefts equal the amount of the policy, the person from whom the moneys were stolen is entitled to the proceeds of the policy. *Dayton v. H. B. Claffin Co.*, 41 N. Y., Suppl., 8.9.

When a loan, payable in monthly installments, including interest due at the time of payment, is made at the highest legal rate of interest, and notes are given for each installment, including the interest due at the maturity of each note, the fact that the notes provide for interest after maturity in case of default does not render the loan usurious, since, if the notes are paid at maturity, the contract is legal, and therefore the default of the borrower will not make it illegal. *Criider v. Loan Association*, (Texas), 37 S. W. Rep., 237.

According to a recent decision of the supreme court of Illinois, a parol contract to make no will that will deprive one of property which she would take as her's if there was no will, having relation to real estate and personalty and being within the statute of frauds as to the former, is indivisible, and therefore wholly void; and the legal adoption by a grandmother of her deceased son's only daughter, as her own child, is not such a part performance as will take such a contract out of the statute. *Dicken v. McKinley*, 45 N. E. Rep., 134.

A joint action will not lie against the separate owner of dogs which unite in destroying the property of a third person. Each person is liable only for the damage done by his own dog, and not for that which is done by the dogs which do not belong to him. This rule applies to all cases of trespass by animals. "The reason which makes one who personally aids in or about the wrong done by another liable for the whole amount of the injury done, does not apply in a case like that under consideration. It the case of a joint tort, each offender's liability arises out of the fact that his participation in the wrongful act was voluntary and intentional; and the law, as a punishment for his wrong doing as well as for the protection of the rights of the injured party, makes him answerable for all the consequences of that act. But, in the case of animals which wander off and unite in perpetrating mischief, there is no actual culpability on the part of their owners. Liability in such a case only exists by reason of the negligence of the owners in permitting their animals to stray away and commit the depredations, and it has therefore always been held when the question has come before the courts that joint action will not lie against separate owners of dogs which unite in committing mischief." *State v. Wood*, (N. J.), 35 Atl. Rep., 654.

#### THE TORRENS LAW.

A matter of great interest throughout the entire state and one in which every county as well as every owner of real estate in Ohio has a part, is the hearing to be had before our supreme court on April 16, as to the constitutionality of the Torrens land law. The attorneys in the case are now preparing their arguments in the matter and the case is to be given an elaborate presentation. The suit grows out of the refusal of the auditor and treasurer of state to purchase the necessary books to put the law in operation. This, would have entailed an expense of between \$30,000 and \$40,000. The attorney general thereupon brought mandamus proceedings to compel them to buy the necessary books and distrib-

ute them among the counties of the state. The refusal of the auditor and treasurer was not because of any antipathy to the law but simply a desire to settle the question of the constitutionality of the law at the start and thus do away with the possibility of future litigation. There is much, however, depending upon the outcome, and this is shown by the interest the various county officials throughout the state are manifesting as to the outcome of the suit, for if the law is held to be constitutional it will immediately be put into operation and adopted by the different counties. This will then greatly simplify the work of land transfers and do away with the endless confusion attendant upon the present system. But again on the other hand if the law should be held unconstitutional no change will be made and the present system of registration will remain in force. The best of legal talent has been obtained. R. A. Harrison and ex-Attorney General Richards will represent the auditor and treasurer of state. Attorney General Monnett will represent the state.

#### THE MOSGROVE LAW.

The first judicial decision under the Mosgrove medical trust bill was rendered by Judge Kohler, one of the ablest jurists of the state, and who is now sitting on the common pleas bench in Summit county and who was formerly attorney general of the state. In substance Judge Kohler decided that the Mosgrove law does not cover any method of healing where medicine is not administered.

The law was enacted by our legislature February 27, 1896 (92 O. L., 44) and provides for the regulation of the practice of medicine in Ohio. It was enacted at the instigation of the doctors of the state for the purpose, more than any other, of putting a stop to various practitioners who do not employ drugs in the healing art. The medicine business has been greatly injured of late years by massagists, electricians, osteopaths, faith curists, christian scientists and others who are opposed to the use of

drugs, but who by their peculiar methods have, it is asserted, effected many cures and have been potent in educating people away from the doping habit.

The plaintiff in error, Eastman, was charged upon an affidavit with the offense of practicing medicine without a certificate, contrary to the provisions of the above mentioned act, and was arrested on complaint of an organization of young and aggressive physicians. He was brought before the mayor of Akron and fined \$25 and costs for not having complied with the provisions of the Mosgrove law. The question thus raised is in many respects a new one, and although the case was carefully examined by counsel for the state and the accused, and very excellent briefs were presented to the court, yet no case exactly parallel had been referred to. In all probabilities the case will be carried up, and there is no doubt but that the decision rendered by Judge Kohler will be sustained, and if the medical trust wishes to force people to take medicine whether they want to or not they will have to get another law enacted.

#### DEATH OF HON. GEORGE L. CONVERSE.

The death of Hon. George L. Converse, of Columbus, Tuesday morning of this week, removes one of the oldest and most respected residents of Franklin county.

The early life of Mr. Converse was marked with adversity which was overcome only by earnest and faithful work, which only added temper to the character he developed. He was born in Georgetown, Franklin county, Ohio, June 4, 1827. His father was a physician, the son of Sanford Converse, a soldier in the war of 1812. The family descent is from the French Huguenots, and the first of the American line came to the western continent with Winthrop. Mr. Converse, guided and assisted by his widowed mother, obtained the elements of his education at the district school, and at the age of 14 entered college. He was entirely dependent on himself for means to pursue his educa-

tion and worked for the farmers in the vicinity during vacation. At the end of his junior year he entered Dennison university at Granville and graduated in 1849. In 1850 he entered the law office of General Joel Wilson, of Tiffin, and was admitted to the bar and began the practice of law at Napoleon soon after. He soon after removed to Columbus where he has been a leading lawyer and public man for thirty-eight years. In 1854 he was elected prosecuting attorney of Franklin county, and after serving one term declined a re-election. In 1859 he was elected a representative in the legislature, serving two terms and in 1863 he was elected to the state senate and was the leader of the democratic minority. In 1873 Mr. Converse was again called upon to represent his county in the legislature. He was selected speaker when the house organized and made a very popular presiding officer and a skilled parliamentarian, in 1875 he was again re-elected. In 1877 he was a candidate before the democratic state convention for governor. In 1878 he was nominated for congress and was elected, and in 1890 and 1892 he was again re-elected. During his first term in congress he served as chairman of the committee on public lands. He was a faithful worker in the interests of his constituents, and it was during his term of service in congress that Columbus was made one of the seats for holding the United States court and appropriations for the government building were made.

Mr. Converse attained a very high rank in his profession and was identified with some of the most prominent criminal as well as civil cases in the history of Franklin county. One of the first cases in which he made an enviable reputation was the Phelps murder case in which the accused was acquitted on the ground of self-defense.

Mr. Converse leaves surviving him a widow and four children.

#### MEMORIAL OF HON. JOHN W. SATER.

To the Members of the Bar of Darke County:

Your committee appointed to prepare resolutions on occasion of the death of

the Hon. John W. Sater, submit the following:

This is the fourth time within the last half year, that the members of the Bar of this county have been called on to mourn the death of one of their small band. In our sorrow for his death and as a tribute to his memory, we note some facts, out of many that might be referred to connected with the life and professional career of him who has just passed from our midst.

In the early prime of a vigorous manhood Brother Sater came among us, while yet the great war of the rebellion, in which he had taken a soldier's part, was still raging, to make his home in Greenville, where he has ever since resided. He had been admitted to the Bar and had practiced for a short time in our neighboring county of Preble, and had already made his mark as a lawyer. From that time to the present, with occasional intervals in which he was engaged in publishing and editing a newspaper, at another time in carrying an interest in a mercantile firm, both for short periods, and in most of his busy life in acquiring and managing large interests in real estate, he was at all times and above all things and continuously, a lawyer. His practice was large and his life a busy one at the Bar, with the exception of one term as judge of the court of common pleas of this judicial district. His knowledge of the fundamental doctrines of the law, his extensive and thorough acquaintance with cases and precedents, his long and close familiarity with the practice, and his clear, ready and analytic mind, and urbane and pleasant manners, made him a judge before whom it was a pleasure to practice law.

At the end of his term as judge, he was not a candidate for re-election, but gladly returned to the bar and its contests. The *certaminis gaudia*, the delights of the strife of mind with mind, the clash of one keen intellect with another, he always enjoyed. He tried his cases for all that was in them, and until stricken by the disease which finally carried him off, no one among us did his work more thoroughly than Judge Sater.

His distinction as a lawyer was not confined to his own county or district,

but extended throughout the State, and in 1893 he became the unanimous choice of the great party of which he was an honored member, for the position of judge of the supreme court of the state.

The most useful and enduring benefit conferred by Judge Sater on his beloved profession was connected with the founding and establishment of the Greenville Law Library. The idea originated with him, and the splendid collection which we now own, and which is a credit to our bar and our city, useful to court and counsel, and to our public officials and the magistrates and dispensers of the law throughout the county who desire to consult its thousands of volumes, was built about his handsome and valuable private law library, contributed to a corporation not for profit, and from whose use he derived no greater benefit than the least of its members. The stock that he held in it only represented the largeness of his heart and his love for the profession.

Be it therefore resolved, by the members of the Bar of Darke county, here assembled; that the Bar of this county has lost one of its ablest and most efficient members; that he will be sadly missed in court and office, and in all our professional assemblages; and that we join with his family and many friends in their mourning for his untimely death.

*Resolved*, That we extend to the bereaved wife and sorrowing daughters of the deceased our heartfelt sympathy in this time of their great distress over the death of the husband and the father in the very prime of an active and busy life.

*Resolved*, That we will attend the funeral in a body and do all that may be done to show our respect and esteem for our deceased brother.

*Resolved*, That the judge of the court of common pleas, whose honored seat he once occupied, and the judge of the probate court of our county, where he long practiced, be requested to spread these resolutions on their journals; and that the clerk of the court of common pleas furnish a copy of the same duly certified under the seal of the court to the family of the deceased.

*Resolved*, That the editors of the newspapers of the county be respectfully requested to publish these resolutions in their respective journals.

J. R. KNOX,  
J. C. ELLIOTT,  
D. W. BOWMAN,  
D. L. GASKILL,  
J. I. ALLREAD,

Greenville, Mar. 25. Committee.

#### MEMORIAL OF HON. JACOB SCROGGS.

The Crawford county Bar Association held a special meeting Friday of last week to take action on the death of Hon. Jacob Scroggs, of Bucyrus. The committee on resolutions reported through its chairman, Hon. J. G. Meuser, of Galion, offering a beautiful memorial tribute to the life and character of Mr. Scroggs, which was adopted, and is as follows:

Memorial of Jacob Scroggs, late a member of the bar of Crawford county, Ohio.

Jacob Scroggs was born at Canton, Ohio, August 11, 1827, of Scotch German parentage. In 1839 he came with his father's family to Bucyrus where he continued to reside until the day of his death, which occurred March 23, 1897.

His opportunities for acquiring an education were such only as the schools of the town in those early days of its history afforded, supplemented by private study and the knowledge gained through employment through a primitive printing office.

The hardships and privations incident to the existing conditions in this locality exacted the help of the boys in the support of the family, and he was called on early to assist his father at the latter's trade. From this he was promoted to the printing office, where his compensation was trifling, but his eagerness for the acquisition of knowledge stimulated.

As he advanced in knowledge he devoted himself to the teaching of the country school in the vicinity of his home for a number of years. He was also employed as an assistant in a number of county offices and during this period concluded to qualify himself for

the practice of medicine. With this object in view he pursued a course of reading in the elementary works of that profession. As his faculties developed and matured he saw a broader and more congenial field for the application of his talent and the carving out of a career in the study of the law.

He thereupon abandoned his first intention and entered upon the study of the law in the office of the late Judge Hall which he supplemented by a course in the Cincinnati law school, from which he graduated in 1854 and was admitted to the bar, but determined to thoroughly equip himself for his chosen profession he continued his studies another year in the office of the late D. W. Swigart, and then in 1855 opened an office and entered into practice and continued therein to the time of his last sickness with marked distinction and success.

Mr. Scroggs was only modestly ambitious for public place. From 1855 to 1859 he acceptably served as mayor of the town of his adoption and subsequently, for many years, was a member of the board of education and manifested an active and devoted interest in the development of its public schools. In 1864, and again in 1880, he was chosen as one of the presidential electors in this state upon the Republican ticket, and as such voted for Lincoln and for Garfield.

In 1884 he was a candidate for circuit judge. While firm and earnest in his political convictions, as in all things else, and while loyal to his party as he was to the community in which he lived, and to the nation, he was at no time a partisan, and it was due to this characteristic as much as to his innate modesty that he reached no station of eminence in public life.

It was, however, in his professional career that Jacob Scroggs achieved his chief distinction and gained the highest esteem. Honest, earnest, faithful and fearless in the discharge of his professional duties, and painstaking and tireless, the fragrant memories of a model professional career will still be an incentive, a guide and a monitor to those who follow after him in his profession. When the political distinctions which satisfied his modest ambition are forgotten.

The peculiar attributes above enumerated made him as fair toward his adversaries as he was truthful and honest to his clients and to the courts. Reared in the school of the elder day, his manners and deportment were such that they called for the impress of dignity and respect, both upon the court and its proceedings. With him a trial was a contest between right and wrong, and the judicial tribunal the arbiter who had been selected by the concordant voice of all the ages.

Whether addressing himself to the chancellor or to the judge and jury, he questioned neither the integrity nor the capacity of the tribunal, and in the treatment of his professional brethren he displayed charming courtesy and considerate kindness. Endowed and constituted as he was, he could not otherwise than hold shams and the tricks and subterfuges under which untruth and wrong seek refuge in utter loathing and contempt, and looked upon him who was ordered thereto with withering scorn. It was only by this that the spirit of the lion within him could be aroused, and woe to the culprit who aroused it, and his respect thus forfeited could never be regained.

From the strict ethics of the profession he never departed, nor could he excuse nonobservance in others. Jealousy found no abiding place in his breast. He envied no rival, and the younger members of the profession found in him always a wise counsellor and a kind friend. In the diversions in which most of us seek recreation and rest he took no interest. His diversions were found in the pleasant companionship of friends or exploration in the broad fields of literature. If the retrospect of his professional life brings in view the clashings of the contentions and harshness of the exacting care and toil which constitutes the chief incidents, we need but turn our glance to the haven of his home to change the scene and please the eye.

We see him there, a model before the family hearth, genial, kind, devoted and considerate, and the gentle touch of reciprocal affection has smoothed all the furrows of care on his brow. Strong, in mind, clear in his conviction, broad in his views, and firm in his purpose, seek-

ing only the right, and having found it, shaping it for the good of his fellow man, we should not marvel because his religious convictions could not be confined within the shortened lines of distinctive creeds, nor that his faith in God and immortality was as firm as the adamantine hills.

In view of these reflections and as a slight mark of respect for a departed brother, and as a feeble expression of a great loss which the bar of this county has sustained in the death of Hon. Jacob Scroggs, we ask that the court may order this memorial to be spread upon its records and that a certified copy thereof may be sent by its clerk to the widow and only son of the deceased.

S. R. HARRIS,  
THOMAS BEER,  
D. C. CAHILL,  
J. G. MEUSER,  
P. W. POOLE.

## SUPREME COURT OF OHIO.

### Official Record of Proceedings.

#### General Docket.

TUESDAY, *March 30, 1897.*

3668. David R. Paige v. Albert T. Paige, Assignee. Error to the circuit court of Summit county. Judgment affirmed.

4217. William Peter v. The Union Manufacturing Co. et al. Error to the circuit court of Lucas county. Judgment reversed in part, and remanded for further proceedings. To be reported.

4291. The B. & O. R. R. Co. v. John Stankard et al. Error to the circuit court of Erie county. Judgment affirmed. To be reported.

4305. Peter Leffel et al. v. Peter Sintz. Error to the circuit court of Clark county. Judgment affirmed.

4344. Elizabeth Bird et al. v. James Luther Young. Error to the circuit court of Fairfield county. Judgment affirmed.

4372. The Cincinnati, Covington & Newport Ry. Co. v. Frederick W. Wood, Receiver. Error to the superior court of Cincinnati. Judgment affirmed on the authority of *Candee v. Webster*, 9 Ohio St., 452.

4393. Augustus Skiver v. The Leland University et al. Error to the circuit court of Defiance county. Judgment affirmed.

4421. A. F. Pavey v. I. T. Vance et al. Error to the circuit court of Highland county. Judgment affirmed.

4457. Elizabeth Bird et al. v. James Luther Young. Error to the circuit court of Fairfield county. Judgment affirmed.

4485. Francis L. Hartman et al. v. Samuel A. Hunter, Treas. Error to the circuit court of Lucas county. Judgment reversed and cause remanded to the court of common pleas with directions to overrule demurrer, and for further proceedings.

4514. H. M. Douglass v. Augustus Allen. Error to the circuit court of Meigs county. Judgment affirmed.

4518. The Odd Fellows' Beneficial Association of Columbus, Ohio, v. Mary Jane Solverson et al. Error to the circuit court of Morrow county. Judgment affirmed.

4531. Josephine H. McKee v. Israel Raudebaugh et al. Error to the circuit court of Mercer county. Judgment affirmed.

4532. Levi L. Dysart v. Jemima Wollet. Error to the circuit court of Mercer county. Judgment affirmed.

4540. Clay Snyder v. The Solar Refining Co. Error to the circuit court of Allen county. Judgment affirmed.

4541. Kirk, Christy & Co. v. S. S. Chandler et al. Error to the circuit court of Trumbull county. Judgment affirmed.

4546. Mary G. Caldwell v. the City of Columbus et al. Error to the circuit court of Franklin county. Judgment affirmed.

4549. Robinson Reinoehl, Admr., et al. v. Frank Malone. Error to the circuit court of Holmes county. Judgment affirmed.

5015. Isaac N. Bowen v. The State of Ohio. Error to the circuit court of Wood county. Judgment affirmed. Per curiam report.

#### Motion Docket.

2894. Josephine Berchtoldt v. M. F. Fisher, Admr. Motion by plaintiff to dispense with printing record in cause No. 5488, on the General Docket. Motion allowed.

2895. The T. & O. C. Ry. Co. v. Daniel S. Ambach & Co. Motion by plaintiff to reinstate cause No. 4625, on the General Docket. Motion allowed.

2898. The T. & O. C. Ry. Co. v. Dages, Andrews & Co. Motion by plaintiff to reinstate cause No. 4624, on the General Docket. Motion allowed.

2897. Philip Baker v. Druzella Rice. Motion by plaintiff to advance cause No. 5378, on the General Docket and to be heard with cause No. 4509. Motion allowed.

2898. Jason Blackford v. Thomas E. Beery et al. Motion by plaintiff to reinstate cause No. 4626, on the General Docket. Motion allowed.

2899. The State of Ohio ex rel. Edmond Keyser v. P. S. Blosser et al. Motion by relator for the allowance of an alternative writ of mandamus. Motion allowed.

The City of Cincinnati v. William Holmes et al. Application by defendant in error for a rehearing in cause No. 5140, on the General Docket. Application not entertained.

#### New Cases.

New cases filed in the Supreme Court since March 24, 1897.

5506. Columbus Lodge No. 3, Knights of Pythias, v. Edward T. Mithoff. Error to the circuit court of Franklin county. Cyrus Huling and J. T. Holmes, for plaintiff.

5507. The State of Ohio v. Robert Groenland. Exceptions to the court of common pleas of Hamilton county. D. L. Sleeper and O. J. Renner, for plaintiff.

5508. The Central Ohio Natural Gas & Fuel Company v. The Capital City Dairy Co. Error to the circuit court of Franklin county. Outhwaite & Linn, for plaintiff. Thomas Steele, for defendant.

5509. Margaret H. Hutchinson v. The City of Columbus et al. Error to the circuit court of Franklin county. E. L. Dewitt and Frank C. Hubbard, for plaintiff. G. H. Barger, for defendant.

5510. James R. Sprankle v. The City of Cleveland et al. Error to the circuit court of Cuyahoga county. Goulder & Holding, for plaintiff. Miner G. Norton and Phillips, Ford & Crowl, for defendants.

5511. The Second National Bank of Bucyrus v. William Moderwell et al. Error to the circuit court of Crawford county. Harris & Sears and Monnett, Beer & Bennett, for plaintiff.

5512. The State of Ohio ex rel. James S. Rickey, sheriff, v. E. G. Coffin, warden, etc. Mandamus. Henry Bauman, for plaintiff.

5513. Albert Kirk v. Henry Stevenson. Error to the circuit court of Crawford county. Edward Vollrath, for plaintiff. Charles Haltinger, for defendant.

# Ohio Legal News.

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## OHIO STATE REPORTS.

Volume 54, **Ohio State Reports**, is now ready for delivery, and may be obtained at \$1.50 per volume, payable in advance.

Before a son can recover for services rendered for his father while a member of his father's family, he must rebut the legal presumption that such services were rendered gratuitously. *Enger v. Lofland*, (Ia.), 69 N. W. Rep., 526.

In an action on a promissory note or other written agreement, a contemporaneous contract in writing, connected therewith by direct reference or by necessary implication, is admissible as part of the transaction involved. *Seieroe v. First National Bank of Kearney*, (Neb.), 70 N. W. Rep., 220.

A railroad company receiving for shipment goods consigned to a point on the line of a connecting carrier under an agreement to transport them to the terminus of its own road is neither at common law nor by statute of the state of Nebraska answerable therefor after their safe delivery to the connecting lines named in the bill of lading or contract of shipment. *Railroad Co. v. Waters*, (Neb.), 70 N. W. Rep., 225.

John H. Clarke, Esq., of the firm of Hine & Clarke, of Youngstown has severed his connections with that firm, and has associated himself with the well known law firm of Williamson & Cushing, of Cleveland. The name of the new firm being Williamson, Cushing & Clarke. Mr. Clarke is well known throughout the state as one of the most brilliant lawyers in Ohio. He has assisted in making the firm of Hine & Clarke, one of the best corporation firms in the state, and the already strong bar of Cleveland is strengthened by the coming of Mr. Clarke. He has a naturally logical mind, is pleasing and forcible in argument, is a born lawyer, and a thorough gentleman.

Where a partnership was formed which took the property and continued the business of an existing one, and was composed in part of the same persons who were partners in the first, but each had separate articles of partnership, and the interests of the several partners in the two were different, the second partnership was not a continuation of the first, and on a settlement of its affairs a partner cannot be credited with capital contributed to the first, in the absence of such provision in its articles, or such an agreement between its partners. *Nicholson v. Kinsey*, (Tenn.), 38 S. W. Rep., 1033.

A decree reforming a contract fixing the boundary between adjoining land owners on the ground of mutual mistake, is sustained by findings that when the contract was made neither party knew the location of the true dividing line, that it had been previously obliterated, but was located more than 100 feet in plaintiff's favor from the line as fixed in the contract, and that the parties believed that the contract line was correct, though there were no words in the contract which the parties did not intend to include, and none were omitted which they intended to include. *Brewing Co. v. Malott*, (Ind.), 46 N. E. Rep., 23.

Some American juries are inclined to be eccentric in their verdicts, but they cannot hold a candle in this regard to juries of Russia. The most incredible stories are told of Russian jurymen. Thus the foreman of a jury declared he would not send a poor fellow to prison because it happened to be his (the jurymen's) birthday. Another jury had agreed upon a verdict of guilty when the church bells began to ring. They revised their verdict because a holiday had begun. A burglar was allowed to go free because the man whom he had robbed had refused to lend him money. This in the opinion of the jury, was a direct incentive to crime.

### MY SHINGLE.

My shingle is battered and old,  
No longer deciphered with ease,  
So I've taken it in from the cold  
And fastened it up on a frieze.

A long generation ago,  
With feelings of singular pride,  
I regarded its glittering show,  
And pointed it out to my bride.

Companions of youth have grown few,  
Its loves and aversions are faint;  
No spirit to make friends anew,  
An old enemy seems like a saint:

My clients have paid the last fee  
For passage in Charon's sad boat,  
Imposing no duty on me  
Save to utter this querulous note.

And still as I toil in life's mills,  
In loneliness growing profound,  
To attend on the proof of their wills  
And swear that their wits were quite sound!

So I work with the scissors and pen,  
And to show of old courage a spark,  
I must utter a jest now and then,  
Like the whistling of a boy in the dark.

I tack my old friend on the wall,  
So that infantile grandson of mine  
May not think, if my life he recall,  
That I died without making a sign.

When at court on the great judgment day  
With penitent suitors I mingle,  
May my guilt be washed cleanly away,  
Like that on my faded old shingle!

### AN EMPLOYER'S LIABILITY TO EMPLOYEES.

A workman does not assume a risk where he knows there is some danger, without appreciating it.

An employer is bound to use reasonable care to see that machinery used by his workmen is in the proper condition.

The mere fact that a workman received an injury raises no presumption of negligence on the part of his employer.

Where an employee sustains an injury by the combined negligence of a fellow-workman and his employer, the latter is liable.

An employer can not delegate his duty to provide his workmen with proper means, facilities, and appliances for doing his work.

A workman does not assume the risk of injuries from a latent defect in machin-

ery because his opportunity of discovery is the same as his employer's.

An employer is bound to give notice of latent dangers among which the employee is required to work, and of which the employer has knowledge or should have had knowledge.

A person entering the service of another assumes all risks naturally incident to that employment, including the danger of injury by the fault or negligence of a fellow workman.

The mere fact that an employee was careless in doing a certain piece of work does not show that he was a reckless and incompetent workman, whom it was negligent to employ or keep.

Where a workman knows that the appliances with which he works are defective, and he does not complain to his employer, or representative, of their condition, he assumes the risk of their use.

The fact that a superintendent assures a workman that there is no danger, and tells him to return to work, does not relieve the workman of the assumption of the risk, he being of full age and knowing the danger.

The mere fact that a manufacturer hires an unlicensed engineer to run his boiler does not render him liable to other employees for personal injuries caused by the explosion of the boiler.

An employer is not required to use the most improved kinds of machinery in his factory. It is sufficient that the machinery was reasonably safe and suitable for the purpose for which it was used.

An employer is not bound to anticipate every probable risk which may happen in the use of a machine, but discharges his duty if he gives such general instructions as will enable the employee to comprehend the danger.

When an employee's duty to inspect and repair machinery is incident to his use of the machinery in a common employment with other workmen, the employer is not liable to fellow-workmen for the negligence of such employee.

An employer who calls a surgeon to aid an injured employee is not liable for the negligence or malpractice of the surgeon, provided the latter had knowledge and skill ordinarily possessed by other surgeons, and the employer had no rea-

son to suspect that the surgeon would fail in his duty.

An employee of mature years who was removed from one employment to another, without objection by him, can not recover from his employer for injuries received through his unfamiliarity with the machinery which he was required to operate, unless his employer knew of his inexperience in that direction, or was informed of it by the employee.

When the conditions of a mill and the relative situations of the deceased and his fellow-workmen would suggest to a person of common intelligence menacing and obvious perils from the use and operations of the machinery, an employee who continues to work in it assumes the risk, though it arises from the negligence of the employer, and the latter is not liable for the death of the employee.—*Age of Steel.*

#### GOVERNOR—MAYOR PINGREE.

Governor-Mayor Pingree, of Michigan, and Detroit, has met defeat in his rather extraordinary attempt to hold both offices at the same time. The supreme court of that state unanimously decided that having accepted and entered upon the duties of the office of governor, he vacated, *ipso facto*, the office of mayor of the city of Detroit. The court orders the common council of that city to call a special election for the purpose of choosing a new mayor. If, as has been generally understood, it was the intention of Mayor Pingree, if forced to choose between the two offices, to relinquish the higher and more exalted position in favor of the mayoralty, that plan, too, has been defeated by the court, for resignation of the gubernatorial office would, under the court's decision, mean retirement from the state office, without any claim upon the city office. The decision is to the effect that under the constitution the governor of Michigan cannot hold any other office "under the state" and that the mayoralty, being an office created by state laws, and a considerable part of its duties being performed for the state, the inhibition clearly applies to the mayoralty. An even more convincing consideration adduced by the court

is that the governor is clothed with the power to remove the mayor of any city in the state, under certain circumstances, and it may well be asked whether any court could rationally hold that the two offices are compatible, in the light of this fact. The decision is unquestionably sound. Judge Hooker rendered the decision and concluded the same as follows:

"In the course of these proceedings reference is made, on behalf of respondent, to the alleged fact that Mr. Pingree was elected to the office of governor after a public declaration of an intention to continue to perform the duties of the office of mayor, and it is intimated that a result which ousts him from the office of mayor will have the effect to disfranchise the people, and that such a result is fraught with dangerous consequences.

"Were it not for the eminence of counsel who present these considerations to this court, we should hesitate about adverting to such elementary principles as furnish an answer to these suggestions and demonstrate their impropriety as well. Even the power of majorities may be, and often is, restrained by the written constitution, and where the majority assumes to do what is forbidden, or to what is permitted in a mode forbidden by the constitution, the duty of the court to protect the right of minorities is too manifest to require, at this day, either apology for its exercise or an elucidation of its source of authority. If, in law, the effect of the election of Mr. Pingree to, and his acceptance of, the office of governor operated to vacate the office of mayor, a court that would weigh majorities before so declaring would deserve impeachment and the contumely which would follow.

"We have yet to consider the effect of the attempt to execute both offices. Mr. Pingree has taken the constitutional oath of governor, and is in possession of the office of governor performing its duties. This section of the constitution renders the two offices incompatible, as does the rule of the common law already discussed, and the general rule that the acceptance of a second vacates the first of two offices that are incompatible is not only the rule of the common law, but is held to apply to incompatibility growing out of constitutional provisions in sev-

eral of the cases hereinbefore cited. \* \* \*

"From what is said it is obvious that the respondent should not have refused to call an election, and in view of the fact that an election is to be held in Detroit on the 5th day of April next, it is desirable upon the ground of economy, that this vacancy be filled at that time, if it can be legally done. Counsel seem to agree that seven days' notice of the special election to fill this vacancy is sufficient, and there is ample time to nominate candidates at conventions which have been already or can yet be called. It is conceded by counsel for the respondent that primaries for the special election may be held after the time specified in act 411, laws of 1895, if there be time to print the ballots.

"We are, therefore, of the opinion that the election can be lawfully held at that time.

"The writ will be granted as prayed, requiring the respondent to take all necessary steps to hold such election at the time named.

"The other justices concurred."

#### RAILWAY POOLING.

No decision of the supreme court of the United States since that rendered in the Income Tax case, has been commented on *pro and con* as that rendered by the supreme court, reversing two decisions of lower courts, and which has declared that railroads are amenable to laws against the restraint of trade, and that a traffic agreement between them is illegal under the Sherman Anti-trust law of 1890. The decision handed down by the supreme court, March 22, like that rendered against the income tax, is supported by five justices of the court, four justices dissenting.

The case has been in the courts since 1892, when the United States district attorney of Kansas brought suit to dissolve the Trans-Missouri Association. The association included eighteen western railway lines which came to an agreement on freight rates, and although the original form of association, was

maintained by the roads and upheld by the circuit courts of the United States. But the supreme court, however, decides that such an agreement is an unlawful restraint of trade and an attempt to monopolize inter-state commerce.

The opinion was rendered by Justice Peckham, Chief Justice Fuller, and Justices Brown, Harlan and Brewer, concurring. The opinion deals first with the question whether the trust act applies to and covers common carriers by railroad; and, if so, second, does the traffic agreement violate any provision of that act? In answering the first question, the court says in part as follows:

"It cannot be denied that those who are engaged in the transportation of persons or property from one state to another are engaged in interstate commerce, and it would seem to follow that if such persons enter into agreements between themselves in regard to the compensation to be secured from the owners of the articles transported, such agreement would at least relate to the business of commerce, and might more or less restrain it.

"The point urged on the defendant's part is that the statute was not really intended to reach that kind of an agreement relating only to traffic rates entered into by competing common carriers by railroad; that it was intended to reach only those who were engaged in the manufacture or sale of articles of commerce, and who, by means of trusts, combinations and conspiracies, were engaged in affecting the supply or the price or the place of manufacture of such articles. The terms of the act do not bear out such constructions.

"We see nothing either in contemporaneous history, in the legal situation at the time of the passage of the statutes, in its legislative history, or in any general difference in the nature or kind of teaching or manufacturing companies from railroad companies, which would lead us to the conclusion that it can not be supposed the legislature in prohibiting the making of contracts in restraint of trade intended to include railroads within the purview of that act. Neither is the statute, in our judgment, so uncertain in its meaning or its language so

vague that it ought not to be held applicable to railroads. \* \* \* We think after a careful examination that the statute covers and was intended to cover common carriers by railroad."

Regarding the second question above noted, the court refuses to recognize a difference of intent in the title of the act from the language of the body of the statutes which reads as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal."

Proceeding the court says: "The conclusion which we have drawn from examination into the question before us is that the Anti-trust act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature.

"Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does. The agreement on its face recites that it entered into for the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local. To that end the association is formed and a body created which is to adopt rules which, when agreed to, are to be governing rates for all the companies, and a violation of which subjects the defaulting company to a payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet, while in force and assuming it to be lived up to, there can be no doubt that its direct, immediate and necessary effect is to put a restraint upon trade or commerce as described in the act.

"For these reasons the suit of the government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce, or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or com-

merce, no matter what the intent was on the part of those who signed it.

"We think that the fourth section of the act invests the government with full power and authority to bring such an action as this, and if the facts be proved an injunction should issue."

A single railroad, let alone a combination of railroads, is essentially a monopoly as respects three-fourths of the points along its line. These associations affect rates only at the few competing points. They are attempts simply to extend to competing points the monopoly which every road possesses over the far more numerous non-competing points. The decision of the supreme court aims to strike down the monopoly respecting non-competing points untouched.

Justice Peckham in his decision says that, "It is true that as to a majority of those living along its lines each railroad is a monopoly." Competition, therefore, fails in that case to determine questions of reasonable or unreasonable restraint, and the latter must in the same manner be assumed. This does not, of course, concern the further application of the law to the single road, but it does plainly bring the court around to apparent condemnation of private control of railroads, is against public policy and the restraint of trade. The reason employed in the opinion can lead to no other conclusion.

The language of the supreme court would seem to be sufficiently plain. It is, in effect, that combinations entered into by common carriers for the purpose of maintaining rates are violative of the Sherman Anti-trust law, which is held to apply. Efforts will doubtless be made to get around the opinion by ingeniously worded agreements. But such expedients to defeat the obvious purport of a declaration by the highest court in the land, must inevitably intensify the anti-corporation feeling which prevails among the masses, and lead to more stringent legislation. There is danger that defiant evasiveness will, in the end, be productive of greater injury to the railroads than they can possibly gain from shiftiness.

## SUPREME COURT OF OHIO.

### Official Record of Proceedings.

Causes to and including No. 4666, on the general docket, are called and marked submitted. The next call will be to and including No. 4773.

### General Docket.

TUESDAY, March 31, 1897.

4514. H. M. Douglass v. Augustus Allen. Error to the circuit court of Meigs county.

WILLIAMS, J.

In order to maintain an action for malicious prosecution, it must be shown that the prosecution was legally terminated before the commencement of the action; but it is not essential that the plaintiff shall have been acquitted of the charge on a trial of the merits; the entry of *nolle prosequi*, followed by his discharge, is sufficient.

Judgment affirmed.

4421. A. E. Pavey v. I. T. Vance et al. Error to the circuit court of Highland county.

MINSHALL, J.

1. Where one uses a way over the land of another without permission as a way incident to his own land and continues to do so with the knowledge of the owner, such use is, of itself, adverse, and evidence of a claim of right. And where the owner of the servient estate claims that the use was permissive, he has the burthen of showing it.

2. When one who is the owner of a tract of land uses a way over the land of another for the convenience of egress and regress to his own land, without let or hindrance and without obstruction for the period of twenty-one years, he thereby, in the absence of anything to the contrary, acquires a right by prescription to its use as an incident to his land; and the right will pass by a conveyance or descent of the land.

Judgment affirmed.

4485. Francis L. Hartman v. Samuel A. Hunter, treasurer, etc. Error to the circuit court of Lucas county.

SHAUCK, J.

1. Exemption from the operation of a statute limiting actions and in its terms containing no exception is a privilege of sovereignty, and it can be asserted only by or on behalf of the sovereign.

2. A civil action brought by the treasurer of a county under section 1104, Revised Statutes, to enforce assessments for the construction of township ditches is, by the second clause of section 4891, Revised Statutes, barred in six years after the cause of action arises.

Judgments of circuit and common pleas courts reversed.

4217. William Peter v. The Union Manufacturing Company; Error to the circuit court of Lucas county.

1. The directors and managing officers of a corporation for profit should be held to strict good faith in all dealings between themselves and the corporation. Where, however, the corporation is deeply in debt and pressed for money to continue its business; where a large proportion of its capital stock remains unsubscribed for, a great part of which was created by an unauthorized increase of the same, for which such directors and managing officers were chiefly responsible, though acting in good faith and in the belief that their action was regular; where such directors and managing officers believe the only practicable means of obtaining money to relieve the necessities of the corporation, is by disposing of this stock; where accordingly they make diligent but unsuccessful efforts to dispose of the stock at par; where they offer it at a large discount to all its stockholders and generally to others without takers, such directors and managing officers and some others without intending to secure personal advantage, but with a view to aid the corporation, take parts of the stock at the discount price, either paying cash therefor, or canceling debts due to them from the corporation, and they do not afterwards derive any profit on account of such stock, bad faith should not be imputed to them, either in respect to such increase of capital stock or their acquisition of it.

If the corporation subsequently become insolvent the difference between the discount price and the par value of the stock thus purchased, should not be regarded as assets of the corporation, as between those stockholders who bought at a discount and those who did not. In such case the holders of previously issued stock for which they had paid par, should not be allowed to assert the invalidity of the issue of the discounted stock without consenting that its purchasers be placed in *statu quo*.

2. An owner of stock in a corporation for profit created under the laws of this state, in the absence of a by-law to the contrary, has absolute power of disposition over the same, and may dispose of it by sale or gift at his pleasure. If the sale or gift is made in good faith, and the shares, sold or donated, are transferred on the books of the corporation to the purchaser, or donee, the transferer does not remain an equitable owner thereof, or thereafter continue liable to assessment, under the statute of this state, for the payment of future corporate debts, although at the time of the sale or donation, the corporation was insolvent, and the purpose of the former owner, in disposing of the stock, was to escape such future liability.

Judgment reversed in part and affirmed in part.

4344 and 4457. Elizabeth Bird et al. v. James Luther Young. Error to the circuit court of Fairfield county.

SPEAR, J.

1. In giving effect to the act of April 29, 1854, (sec. 4182, Revised Statutes), which provides for the filing of a declaration appointing

one to stand as heir-at-law to the declarant in the event of his death, and for the making of an entry upon the journal by the judge and a record of the proceedings, it is not essential that the declaration be made in open court, nor that it be made in any particular place. Such declaration may be made before a judge of the probate court within his county at a place other than the office of said court.

2. The entry which the statute requires the judge to make upon his journal and the record of the proceedings, do not constitute a judgment, and it is not essential to the validity of the proceedings that the order for such entry be made by the court. It is sufficient if it be made by the judge.

Judgment affirmed.

4291. Baltimore & Ohio Railroad Company v. John Stankard et al. Error to the circuit court of Erie county.

BURKET, C. J.

One of the rules in the relief department of a railroad company, provided that all claims of beneficiaries should be submitted to the determination of the superintendent, whose decision should be final and conclusive, unless appealed to the advisory committee, and in case of such appeal, the decision of the committee should be final and conclusive upon all parties without exception or appeal: Held, that after the rejection of a valid claim by the advisory committee, the beneficiary could maintain an action in court for the recovery of the money due thereon, and that such rule was not a bar to the action.

Judgment affirmed.

5015. Isaac N. Bowen v. The State of Ohio. Error to the circuit court of Wood county.

BY THE COURT:

It is not a defense to a prosecution under the act of April 16, 1890 (87 O. L., 216), that, an agreement of separation was entered into by the accused and his wife, by which the latter, who was given the custody of their minor children, agreed, for a valuable consideration to furnish them all proper support, and that after the mother became unable to support the children, the accused offered to support them if she would surrender their custody to him, which she refused to do.

Judgment affirmed.

General Docket.

FRIDAY, April 2, 1897.

5510. James R. Spankle v. The City of Cleveland et al. Error to the circuit court of Cuyahoga county. Judgment affirmed. The Rooney contract does not include the subject matter sought to be enjoined.

5512. The State of Ohio ex rel. James S. Ribkey, sheriff, v. E. G. Coffin, warden of the penitentiary. Petition for mandamus. Peremptory writ of mandamus allowed as prayed for. Per curiam report.

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## OHIO STATE REPORTS.

Volume 54, **Ohio State Reports**, is now ready for delivery, and may be obtained at \$1.50 per volume, payable in advance.

Mayor-elect Samuel L. Black, of Columbus, has tendered the position of director of law under his administration to Judge S. N. Owen, and the latter has accepted. Judge Owen served five years on the supreme court bench, and before that served on the common pleas bench of Williams county. He is a distinguished jurist of known ability.

J. D. Henry, for twenty-five years a member of the Cincinnati bar, died of paralysis at his home on Shillito street, Avondale, Monday evening of this week. The stroke which carried him off was received on the night of April 5th. Previously to entering upon the practice of the law he was a school teacher in Guernsey county, this state. His age was fifty-seven. He was largely employed in the settlement of estates and other office practice. He was a painstaking lawyer and a man of high character.

Judge Jelke, of the Hamilton common pleas, holds that mandamus will not lie against the county auditor to compel him to issue a second voucher in favor of the Boston Woven Hose Company, for the sum of \$319.50 for goods sold by its agent, A. S. Browne, to Longview Asylum. The bill had been approved by the county commissioners, and a warrant was issued by the county auditor in favor of the Boston Woven Hose Company. The warrant was delivered to their agent, who collected the money from the county treasurer and thereafter suicided without accounting for it to his company. Judge Jelke held that it was not an unwarranted stretch of authority for the auditor to deliver the warrant to Browne, but that Browne, being a mere selling agent, the payment of the warrant by the county treasurer, to him was wholly without authority, and that the company's remedy is by an action at law.

An important decision was rendered by Judge Johnson of Milwaukee, Wisconsin, last week Wednesday, in the South Milwaukee crossing war between the Chicago and Northwestern Railroad Company and the Milwaukee Electric Railroad Company. The court in rendering its decision say in effect that the electric companies cannot make use of a wagon road as a right of way, where it is the intention to carry anything except passengers, without paying damages to the abutting property holders. This applies to cities as well as to the towns and villages. While the steam companies have been obliged to condemn and pay handsomely for their right of way, the electric companies have been making use of the public highways without paying one cent therefor.

Judge Ferris of the Hamilton probate court refused to enjoin the distribution of \$146,000, which has come into the hands of the executors of Elizabeth Bates. The application for injunction was made by the Union Stock Yards Company, successor in the title to property, the title to which was guaranteed by a bond in the sum of \$150,000, executed by E. S. Bates, deceased, (husband of Elizabeth Bates), and others. The contentions of the company was that there is an outstanding interest in the title, and the company therefore has a claim against the estate not yet due, but which will arise if the title proves defective. Judge Ferris held that the law favors the distribution of estates, that it is for the purpose of distribution that estates are administered, and that no reason was shown why a different rule should apply to the estate at bar, the petitioners having an adequate remedy at law:

Judge Pugsley of the Lucas common pleas court, rendered a decision last Saturday in a case in which very little money was involved, but which is important because of a point of law that was involved. Some two years ago the Gashé Lumber company of Toledo ordered a car load of lumber from Koontz & Phillips, which was shipped via the Wheeling and Lake Erie railroad. While the lumber was in transit, or before it was unloaded, the

lumber company became insolvent. Koontz & Phillips attempted to stop the delivery of the lumber, but found that it had been turned over to the railroad company in payment of an old freight bill. The firm thereupon sued the railroad company to recover the value of the lumber which amounted to \$262, basing its claims on the right of stoppage in transitu. The railroad company contended that this right did not apply, because the goods arrived in Toledo before the failure of the consignee. Judge Pugsley found for Koontz & Phillips and gave them judgment for the amount named.

At a recent meeting of the Gloversville Bar Association, of New York, after some discussion it was decided that the practice of giving free consultation and advice so long indulged in by lawyers should be eliminated, and that thereafter all consultations and advice given by members of the association should be charged for.

The Gloversville association has taken a step in the right direction, and it should be universally adopted by every bar association throughout the county. In the smaller cities and towns the practice of making no charge for consultation and advice has been the rule rather than the exception and one which it has been a difficult matter to do away with.

A lawyer's legal knowledge is his stock, his capital, his merchandise. He has spent money and valuable time to acquire it, and there is no more reason why he should give it to another's use and benefit without receiving pay for it than there would be for a clothier to give away his goods or the merchant his stock. If the advice of a lawyer is worth anything, or if it is worth asking for, it is certainly worth paying for. The principle of charging for advice should be strictly adhered to.

#### THE CAT IN COURT.

The little village of Clinton, Oneida county, New York, is all excitement over a lawsuit about a cat. Not far from the college located in that peaceful village lives a very respectable and amiable maiden lady who was the possessor

of a well proportioned male cat for whom its owner had great affection. But like all other cats, he was prone to wander, and in his perambulations about a neighbor's barn, while making such music peculiar to his kind, he was caught in a trap which had been set there, and thence transferred to the college laboratory for experimental purposes. The owner was very indignant and consulted a lawyer, who immediately commenced suit in her behalf before a justice of the peace, to which the defendant filed the following answer:

JUSTICE'S COURT, ONEIDA COUNTY.

Annie Q. Moore against Joseph Searle and Albro D. Morrill	}	Before E. S. Williams, J. P.
--	---	---------------------------------

DEFENDANTS' ANSWER.

For answer to complaint herein  
Defendants most respectfully  
Deny the same, dispute the claim,  
Appearing here regretfully.

This maiden Plaintiff's Thomas cat  
Was filled with bad propensity  
To prowl and fight, and scratch and bite,  
And howl with great intensity.

This *feline fera natura*  
Would go with great velocity,  
Not after rats but neighbors' cats,  
And claw them with ferocity.

*Felis damage-ferant was,*  
*Sic scripsit magna curia:*  
To stop his breath and cause his death  
*Damnum absque injuria.*

We tried to rid us of this pest,  
"The cat came back" and squall'd defiance;  
Not knowing that 'twas Plaintiff's cat  
We thought we'd offer him to science.

And now we ask this learned Court  
For judgment in this cause unholy,  
In justice's name dismiss the claim  
With costs and soothe our melancholy.

D. F. SEARLE,  
Attorney for Defendants.

EXTENSIONS OF STREETS.

The supreme court of the United States has just decided a case of far-reaching importance. The question presented to the court for decision was whether a judgment of a state court, which takes and appropriates to the use of the public,

land owned in fee simple by a railway company, for compensation that is merely nominal, reserving to the company the right to cross the street when opened for general use, was a violation of the constitutional provision against taking property without due process of law. The railway company set up the claim that they were entitled to the same rate of compensation for the land appropriated which the city allowed to individual owners of contiguous property. In one of the cases tried, the city paid the individual property owners whose lands were condemned, about \$8,350—the full market value—in damages, while for the strip of land belonging to the railway company embracing 10,798 square feet, it paid only \$1.00. This discrimination was made under a city ordinance providing that the municipality may at any time open a street through a railroad company's right of way by paying \$1.00 nominal damages to acquire title.

The main question which the supreme court was called upon to decide was as to the constitutionality of this ordinance, and the correctness of the ruling by the state court upholding it as sound law. The national court answers in the affirmative. While conceding that the railroad company holds its lands in fee simple, just as any private owner does, it is regarded as inequitable and against public policy to permit a railway corporation, which originally acquired its right to its land and franchise from the public, to assume an obstructive attitude and prevent needed public improvements. The right of the railroad to cross the new street with its tracks not being impaired in any way, it is found to part with its title and give way to the interests of the public. This is, we believe, a new and radical departure, somewhat startling at first glance; and while the subject is not entirely free from difficulty, the principle thus clearly enunciated by the highest court in the land is sound and reasonable. It will be heard with gratification by the people of many states, particularly those residing in the large cities, where the work of extending streets can now go on without fear of being compelled to pay heavy damages for the privilege of crossing the right of way of railroad companies.

### USE OF POSTAL CARDS.

The right of a creditor to use a postal card in making a statement of indebtedness came up recently before United States Commissioner Foote, of Chicago, and was upheld. The complainant was G. W. Cooley, of Kansas City, and Brown Bros., of New York, were the parties complained of. Assistant District Attorney Rosenthal said he would not insist on the commissioner holding the defendants for the grand jury. The action was doubtless based upon an act forbidding the mailing of libelous postal cards, upon which were written epithets, terms and language of a libelous, defamatory and threatening character which were intended to reflect injuriously upon the character, honesty or conduct of individuals.

It is a wonder that the affidavit in the above mentioned case was ever permitted to be filed. There must be an intention to commit a crime before there can be a violation of the law. That intention is gathered by the surrounding circumstances and the acts of an individual. The mere fact that a firm from whom merchandise had been purchased rendered a bill for the same on a postal card and sent the same through the mails is suggestive of nothing that could possibly be construed as defamatory of character or in any respect injurious to the character of the person addressed. It, in effect, said that goods had been purchased of a stipulated amount, contained no implied suggestion that the bill was due, or an inference of a refusal to pay when due, or a threat of suit, or in any way implied dishonesty. A wide distinction exists between this case and where a postal card is written to a debtor upon which is written a dun for the amount due and suit threatened if not paid, or where a card of like nature is daily sent through the mails. Such acts come within the spirit of the law, because they contain epithets and language of a threatening character and of a defamatory nature, reflecting injuriously upon the character and honesty of the person to whom they are addressed. It does not follow that because an individual does not pay an account that he is therefore dishonest.

His intentions may be good and his moral obligation to pay may be keenly felt, but he has nothing to pay with. His inability to pay an account justly due, his character and standing in the community should not be injured or his good name be brought into disrepute among his neighbors. The law very justly prohibits anything being written upon a postal card and sent through the mails which will reflect injuriously upon the character of individuals.

### HOW BIG LAW OFFICES WORK.

The following article is taken from the *New York Sun* and will doubtless prove of interest to young lawyers:

"If I were a young lawyer again, just striving for my first honors, and looking for a place to settle," said Benjamin F. Tracy to a young attorney the other day, "I am sure I could not do better than begin right here in New York city or in Brooklyn. I have passed through the mill, and my experience has convinced me that there are more openings here, and there is as much chance to get to the top, and when you do get there the rewards are far greater than anywhere else in the United States."

Whether the General is right or not, it is highly probable that he will be supported in this opinion by the greater part of the well-established lawyers of the two cities. Nevertheless, a great deal can be said on the other side of the question.

The remarkable changes that have taken place within the last ten years in all the great cities of the United States, but more particularly in this city, in the organization of great law firms and in the conduct of their business has compelled the law clerk or the young lawyer to become a part of a rigid system that without doubt repels the more ambitious.

The old practice of a young man just admitted of "hanging out his shingle," as the saying goes, has become nothing more than a tradition. In this city more than 99 per cent. of the young lawyers do not even take desk room as independent practitioners, but become law clerks. That means working under orders, submitting to the drudgery that

the older clerks will not endure and sinking one's identity behind the army of assistants that the members of the firm direct. This, moreover, is not solely the experience of the clerk and the young attorney. There are hundreds of lawyers in this city, men in the prime of life and members of well-established firms, who are never heard of, for the simple reason that their names do not appear in the firm's style, and that business is transacted with the firm or corporation (as it might be called), the individual being of little moment.

The conduct of one of these large offices is similar in a great many respects to the management of a great newspaper office. The office staff is usually divided into two general classes. There is the corps of business clerks, and there is the corps of law clerks. The business clerks have nothing to do whatever with law matters. They attend solely to the commercial requirements of the firm and perform their duties under regulations similar to those of any other business establishment. They are directed in their labors by a chief clerk, who is responsible to the member of the firm who takes supervision of the office assistants.

The corps of law clerks is the one of which the aspiring young attorney becomes a member. They have wholly to do with law matters. These clerks are young men and women who are studying for the bar or have been admitted. Of the latter class it is true the most are young men, but unfortunately, it is a fact, and one that often demonstrates the fault of the new system, that a lawyer with fair capabilities never rises above the grade of the law clerk. Just how many of these law clerks there are in this city is not a matter of statistics, and it would be very difficult to make anything like a correct estimate. Their number will reach into the thousands and the tens of thousands. Add to this number those in Brooklyn, and the total will be increased by some thousands more.

The law clerks are captained by a clerk, who is dignified by the title of managing clerk. In almost all cases he is a lawyer and the senior clerk in the office. In many instances he is in the prime of

life. In large offices the managing clerk has usually worked himself up from office boy or student.

So extensive is the tendency toward the consolidation of the law business with very large firms, to the exclusion of the small practitioner, that some of these managing clerks have from twenty-five to thirty men working under them.

It used to be the general impression, and the fact as well, that when a lawyer had made his reputation he didn't trifle with very small cases. Under the present system, however, this is all changed. One of these large law corporations never finds the case, with certain limitations, that is too small for its attention. This further complicates the duties of the managing clerk.

The under clerks find out what they have to do from the managing clerk, and this dignitary gives out his orders in much the same way that a city editor does to his staff of reporters. The managing clerk has both his case book and his calendar. In his case book are entered all of the cases as they come into the office, classified as to the course in which they arise and sometimes by the nature of the action. This classification having been made the cases are apportioned by classes to the different clerks who attend usually to those particular cases. After once having been appointed to look after a case each clerk is expected not only to keep exact minutes of its progress but to report the same to the managing clerk, who enters the fact upon his records.

The assignment of clerks to the attendance of cases in court or to the other duties in the office are made from the day calendar, and usually on the afternoon preceding the day on which the duty is to be performed. If the task to be imposed be the drawing of pleadings, the assignment is usually made before this, but it is not so necessary that the managing clerk should look after this particular line of work on the day calendar, for it is very rarely that a clerk having charge of a particular case overlooks so formal a matter as that.

The particularity with which details have to be cared for makes the most rigid system necessary. All of the most

interesting parts of the practice are looked after by the junior members of the firm, or by the senior clerks, who are lawyers. The pleasing experiences of fame and fortune that the young man dreams of as a student are not open to him in the stern practical life that he encounters in working for one of these firms. The pay of the clerk ranges all the way from \$3 a week to \$5,000 a year. The man who would command the larger sum must be a well-equipped lawyer. If he had been able to establish himself in business with his ability at the same period of life he ought to be able to get from his practice three times that sum.

Whatever may be said in favor of the present system, it is certain that it is following the consolidation movement in other lines of business. It is very difficult for a young lawyer, unless he is exceedingly bright, to rise from the rank of the clerk to that of a partner in the firm. Such progress is known and occasionally noted, but it is indeed rare. It is the height of every aspiring young lawyer to become an advocate, or what is known in common parlance as a trial lawyer. By working up through a clerkship it will take years of patient toil and the demonstration of ability in many lines before the clerk will have an opportunity to try a case, and thereby have the prospect of membership in the firm held open to him. Many young men who are called to the bar have far more fitness for the trial of cases than for following with scrupulous accuracy the details of a large office. It has been shown time and again that such men frequently develop fair ability on the trial of their first case, and in a short while become able to try a case with much more skill than many lawyers of established standing at the bar. It is usually the case, too, that not only are these born advocates more or less unqualified for the routine of work of an office, but such duties are positively offensive to them.

Such are the facts that cause the best recruits to the bar to hesitate before they will accept a clerkship in a large office, however alluring the prospect may seem when the offer is made. The same considerations are driving many young men into the small towns up the state and the far west. The records of the alumni of

the law schools will prove that they do have this tendency. The fact is also depriving New York City and Brooklyn of legal timber of which they are in great need.

Elihu Root is quoted as having said recently that never before in the history of this city has the bar been in such dire need of young lawyers of good promise. The judges who preside at the trials in our supreme court or in our criminal courts say that in all of the host of lawyers in this city there are not a score who can try a case well. They will say that not one lawyer in a hundred who endeavors to try a case understands the most necessary principles underlying the cross-examination of a witness or the summing up to a jury. One of the best known judges in this state stated not long ago that it was a rare thing in his experience to find one of these so-called trial lawyers who knew how to put in an objection in a strictly legal form or impeach a witness on his cross-examination.

## SUPREME COURT OF OHIO.

JANUARY TERM, A. D. 1897.

Causes Assigned for Oral Argument.

### FIRST DIVISION.

Wednesday, April 14.

4232. H. P. Chapman, treas., etc. v. The First National Bank of Wellington, O.

5272. Walter Plummer v. The State of Ohio. To be heard by whole court.

Friday, April 16.

5380. The State of Ohio ex. rel. Attorney General v. W. D. Guilbert, auditor of state et al. (Torrens case.) (To be heard by whole court.)

Wednesday, April 21.

4306. Emerson McMillin v. The C., C., & St. L. R'y Co.

4614. Pennsylvania Co. v. Susan Hurless. (To be heard by whole court.)

Friday, April 23.

5431. The Incorporated Village of New Lexington, Ohio, v. James Hughes.

4650. The Board of Trustees of the Ohio State University v. Henry P. Pulsom et al. (To be heard by whole court.)

## Wednesday, April 28.

4906. Thomas C. Platt, president, etc., of United States Express Co. v. William R. Colvin et al.

4848. Henry Korb et al., commissioners of Hamilton county v. The State of Ohio ex. rel. James E. Collins et al., trustees, etc. (To be heard by whole court).

## Friday, April 30.

4661. The Castalia Sporting Club et al. v. The Castalia Trout Club Co. (To be heard by whole court).

## Wednesday, May 5.

5215. I. J. Miller et al., trustees, etc., v. E. W. Kittredge.

5381. The C. H. & D. R. R. Co. v. Ada Crumley, adm'r.

## Friday, May 7.

4509. William Meredith v. Jonathan A. Franks et al.

5378. Philip Baker v. Druzila Rice.

4551. Robert Garrett, surviving partner, etc. v. D. A. Hollingsworth.

## Wednesday, May 12.

4571. The News Printing Co. v. Isabel Simms.

4581. Benjamin Kingsborough v. William V. Tousley et al.

4660. Benjamin Kingsborough v. William V. Tousley et al.

## Friday, May 14.

4597. Don De Witt et al. partners, v. Robert Henderson.

4603. William A. Neil v. John J. Eichenlaub et al.

## Wednesday, May 19.

4621. James B. Gormley, assignee, etc., v. E. J. Cunningham et al.

4648. The Village of New Lisbon v. Ralph Elliott.

## Friday, May 21.

4624. The T. & O. C. R'y Co. v. Dages, Andrews & Co.

4625. The T. & O. C. R'y Co. v. Daniel S. Ambach & Co.

## SECOND DIVISION

## Thursday, April 29.

4139. Frank Lowe v. C. S. Hunsicker et al.

4359. Sarah Jacks et al v. Mary A. Adamson.

## Wednesday, May 5.

4157. Charles A. Gates, admr., etc. v. The Tippecanoe Stone Co. et al.

4542. Charles A. Gates, adm'r., etc. v. The Tippecanoe Stone Co. et al.

4553. John G. Hower et al., partners, v. J. E. Williams.

## Thursday May 6.

4554. Mark Richardson v. Robert H. Jenks et al.

4584. The L. S. & M. S. R. R. Co. v. James M. Wentworth.

## Friday, May 7.

4587. The Cambria Iron Co. v. Robert W. Keynes et al.

4596. Charles Hollinger et al. v. Jacob Knoblock.

## Wednesday, May 12.

4611. Levi Mills, trustee, etc., v. M. Kelley et al.

4623. James McLandsborough, adm'r., v. Jane Lyle et al.

## Thursday, May 13.

4637. Jacob Henn v. William Horn.

4638. Jacob Henn v. The Board of Publication of the Evangelical Association of North America.

4644. The Allemania Loan and Building Co. No. 2, of Cincinnati, v. Jacob Frantzreb et al.

## Friday, May 14.

4612. The T. & O. C. R'y Co. v. The Bowler & Burdick Co.

4654. R. G. McQuigg et al. v. Henry Cullens.

## Wednesday, May 19.

4641. The Lakeside and Marblehead R. R. Co. v. William Kelly.

4645. Daniel B. Stewart v. John P. Coe.

## Thursday, May 20.

4657. Harriet W. McAlpin v. Alexander Clarke et al.

4886. Harriet W. McAlpin v. Alexander Clarke et al.

## Friday, May 21.

4513. The Alliance Standard Review Publishing Co. v Fannie L. Valentine.

4665. The United States Mutual Accident Association of the City of New York v. Kei.h M. Hubbell.

Court meets for the hearing of oral argument at 8.30 o'clock a. m. (standard time). The second division will hear the cases assigned to it in the hall of the house of representatives.

## SUPREME COURT OF OHIO.

## Official Record of Proceedings.

TUESDAY, April 13, 1897.

## General Docket.

4376. The P., C. & St. L. Ry. Co v. Henry A. Ensign. Error to the circuit court of Hamilton county. Judgment affirmed on the authority of Railway Co. v. Dunn, 19 Ohio St., 162, and for the reasons stated in the opinion of the circuit court in 10 C. C. R., 21.

4399. *Alexander T. McBeth v. The P., C., C. & St. L. Ry. Co.* Error to the circuit court of Champaign county. Judgment affirmed on the ground that one cause of reversal was as to the weight of the evidence. Other questions not passed upon.

4412. *Erastus M. Smith, admr., v. Franklin T. Cahill, admr.* Error to the circuit court of Hamilton county. Judgment affirmed.

4461. *The North Western Monroe Ry. Co. v. Leonard Tressel, sheriff.* Error to the circuit court of Richland county. Judgment affirmed.

4535. *Viola A. Casler v. Elizabeth H. Bowen.* Error to the circuit court of Cuyahoga county. Judgment affirmed.

4555. *Ella Scheets et al. v. Lizzie Hunter et al.* Error to the circuit court of Columbiana county. Judgment of the circuit court reversed, and judgment for plaintiffs in error. Grounds stated in journal entry.

4582. *A. J. Marling v. E. C. Ballard.* Error to the circuit court of Darke county. Judgment affirmed.

4622. *W. I. Squire v. Henry G. Rausch.* Error to the circuit court of Lucas county. Judgment affirmed.

5427. *George Truman v. Moses A. Walton.* Error to the circuit court of Greene county. Dismissed for failure to file printed record.

5432. *The Pinkerton Bros. Co., et al. v. J. M. Connell et al.* Error to the circuit court of Morgan county. Dismissed for failure to file printed record.

#### Motion Docket.

2900. *The State of Ohio v. Robert Groenland.* Motion by plaintiff to advance cause No. 5507, on the general docket. Motion allowed, cause advanced and briefs to be filed within rules.

2901. *Frank Gates et al. v. The City of Toledo.* Motion by plaintiff to use brief filed in cause No. 4696 in cause No. 4696, and to dispense with printing brief in cause No. 4696, on the general docket. Oral argument requested in both causes. Motion allowed.

2902. *James R. Sprankle v. The City of Cleveland et al.* Motion by plaintiff for a writ of *supersedeas* in cause No. 5510, on the general docket. Motion overruled.

2903. *James R. Sprankle v. The City of Cleveland et al.* Motion by plaintiff to dispense with printing part of record in cause No. 5510, on the general docket. Motion allowed.

2904. *The W. & L. E. Ry. Co. v. George F. Weaver, an infant, etc.* Motion by defendant to advance cause No. 5217, on the general docket. Motion allowed.

2905. *The T. & O. C. Ry. Co. v. The Bowler & Burdick Co.* Motion by defendant for extension of time to file brief in cause No. 4612, on the general docket. Motion allowed and time extended to May 10, 1897.

2906. *James R. Sprankle v. The City of Cleveland et al.* Motion by defendant to ad-

vance cause No. 5510, on the general docket. Motion allowed, cause advanced and heard on its merits.

2907. *The State of Ohio ex rel. attorney general v. The Manufacturers' Mutual Fire Association of Akron.* Motion by trustees for authority to receipt in full and compromise assessments in cause No. 3011, on the general docket. Motion allowed as prayed for.

2908. *The State of Ohio ex rei attorney general v. The National Mutual Fire Association of Akron.* Motion by trustee for authority to receipt in full and compromise assessments in cause No. 3012, on the general docket. Motion allowed as prayed for.

*The Cleveland, Lorain & Wheeling R. R. Co. v. Koehlein Bros.* Application for a rehearing of cause No. 4265. Application not entertained.

*Mary R. English et al. v. William Monypeny.* Application for a hearing of cause No. 3487. Application not entertained.

*The Cincinnati, Hamilton & Dayton R. R. Co. v. Samuel N. Allen.* Application by defendant in error for a rehearing in cause No. 4965. Application not entertained.

#### New Cases.

New cases filed in the Supreme Court since March 31, 1897:

5514. *The Central Union Telephone Co. v. Sallie M. Carr et al.* Error to the circuit court of Richland county. Cummings & McBride, for plaintiff. Jenner, Jenner & Weldon, for defendants.

5515. *The State of Ohio ex rel. attorney general v. The Manchester Fire Assurance Co. of Manchester, England.* Mandamus. F. S. Monnett, attorney general, for plaintiff.

5516. *C. & G. Cooper & Co. v. Springfield Malleable Iron Co.* Error to the circuit court of Knox county. A. R. McIntire and J. D. Critchfield for plaintiff; Critchfield & Devine, for defendant.

5517. *The State of Ohio ex rel. Edmond Keyser v. P. S. Blosser et al., commissioners.* Mandamus. John R. McKinney, John McSweeney and H. R. Smith, for plaintiff. R. W. Funk, prosecuting attorney, and J. D. Metz, for defendants.

5518. *The Central Trust Co. of New York v. Stevenson Burke et al., administrators, et al.* Error to the circuit court of Franklin county. Harrison, Olds, Henderson & Harrison, for plaintiff. Nash & Lentz; Outhwaite & Linn; C. O. Hunter; Watson, Burr & Livesay and Thomas W. Sanderson, for defendants.

5519. *The State of Ohio ex rel. attorney general v. The Buffalo German Insurance Co. of Buffalo, N. Y.* Quo Warranto. F. S. Monnett, attorney general, for plaintiffs.

5520. *The City of Cincinnati and D. W. Brown, auditor of said city, v. The Board of Education of the School District of Cincinnati.* Error to the superior court of Cincinnati. Frederick Hertenstein, for plaintiffs. Simmerall & Galvin for defendant.

# Ohio Legal News.

A Weekly Legal Paper Published by  
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## OHIO STATE REPORTS.

Volume 54, **Ohio State Reports**, is now ready for delivery, and may be obtained at \$1.50 per volume, payable in advance.

An action for damages alleged to have been occasioned by the negligence of a railway company in setting fire to and burning fences and causing damages to pasture land and to a crop of unmatured cotton was held, in the case of *Bagley v. Columbus Southern Ry. Co.*, (Ga.), 84 L. R. A. 286, to be outside of the jurisdiction of a justice's court, because it is an action for damages to realty.

At the September term of the Franklin common pleas court, J. E. Otuman, of Columbus, was indicted by the grand jury at the instigation of the state board of medical examination and registrations. A demurrer to the indictment was filed, and has been pending ever since. It alleges that the law establishing the board, and requiring all physicians to register with them, is unconstitutional. The demurrer was argued at length last Saturday, before Judge Pugh, of the Franklin common pleas, and decision reserved. One of the claims of the board is that Ottmau secured his diploma at a Cleveland medical college in an irregular manner. This was denied by the doctor. It was claimed that no matter how the common pleas court decides the demurrer, the matter will be carried up, and the board's power fixed by the supreme court.

Several suits in which the constitutionality of the law is questioned are now pending in the various courts of the state, but the points raised in the Ottman case are claimed to be quite different from the others.

## A NEW LAW FIRM.

Mills & Reed is the style of a new firm that has just been formed for the general practice of law, at Sandusky, Ohio. Judge Grayson Mills, the senior member, is well known to the profession throughout northern Ohio. He has served on the common pleas bench of

this district, and since his retirement from that office about five years ago, has enjoyed a large and lucrative practice, and is accounted one of the ablest and most successful practitioners at the Erie county bar.

The junior member, Mr. Charles S. Reed, is a native Ohioan, and a son of Hon. D. H. Reed, state representative from Huron county. For the past twelve years he has been in active practice at Fredonia, Kansas. He served two terms as prosecuting attorney of Wilson county, with much distinction, enjoyed a large practice extending over all southern Kansas, and was recognized as one of the foremost young attorneys and political leaders of the state.

The new firm starts out with good prospects, for a bright future and high standing at the bar.

#### ARGUMENTS IN THE TORRENS LAW.

Arguments in the test suit to establish or destroy the constitutionality of the Torrens land law were begun Friday morning, of last week, before the supreme court. The suit is one in mandamus, brought by the attorney general at the instance of the auditor of state and the secretary of state, who, with the attorney general, constitute a commission appointed to draft a series of blanks and forms to be used in the operation of the law, to compel the commission to proceed with their duties.

The validity of the law was assailed by Judge R. A. Harrison and ex-Attorney General John K. Richards. It was defended by Judge S. H. Fitch, of Ash-tabula county, who was a member of the commission that formed the law, and ex-Representative Guy Mallon, of Cincinnati, author of the Australian ballot law. Attorney General Monnett, who is the relator in the case, was not present, being engaged in taking depositions in the fire insurance trust cases at Dayton.

Arguments made by the attorneys opposing the law were that the law is defective in that "the act in question is a law of a general nature, but does not operate uniformly and equally upon all the inhabitants of the state, and is there-

fore void." It was urged that the effect of the act was to put "into operation two separate and distinct systems for the acquisition, conveyancing, encumbering and transmission of land in Ohio." Further, that "the act in question relates to but one thing, and that is to land, but it does not relate to all land within the state. A classification of lands is attempted, and the act is made to operate upon that particular lot of lands which have been brought within the scope of its provisions by the voluntary acts of the holders or claimants of some title thereto, and by the action of the courts in which their applications to have the lands registered are filed, and the registration of the lands by the registrars.

"The act purports to be a general law, yet, if valid, it goes into effect without modifying the general law which is already in existence. The general law now in force is still to remain in full force and effect on all lands except those which have been brought within the provision of the act by the voluntary action of the holder of some title or claim therein and the action which may be had upon his claim."

Another objection raised to the validity of the law was as to whether the act in question, in any particular, impairs the obligation of contract. In support of this contention counsel cite a case which has actually occurred since this act took effect, which was in substance as follows: A held a mortgage upon the farm of B, for a certain sum, executed prior to the taking effect of this act. B, after the act took effect, made an assignment for the benefit of creditors. The farm mortgaged will not sell for as much as the mortgage indebtedness. Section 123 of the act requires the assignee to have the title registered before dealing with the land. Counsel maintained that in such cases, where the costs and expenses of registration must be paid out of the proceeds of the estate assigned and registered, and the fund constituting the only means out of which the mortgage debt can be paid, is thereby reduced so that the fund of the mortgagee arising from the sale is diminished by requiring the title to be registered, and that, therefore, the act, in this respect operates as an impairment of the ob-

ligation of the contract between the mortgagor and mortgagee, and is invalid so far as it affects contracts made prior to the taking effect of the act.

"The act is invalid because it vests judicial power in the county recorder, in violation of article 4, section 1, and the sections conferring this power cannot be rejected without impairing the integrity of the law." Counsel claiming that the county recorders should not be given the right to hear and determine the rights of people, and should not be allowed to adjudicate upon the interests of individual citizens, and to that end to construe and apply the law.

Regarding the assurance feature of this law it was claimed by counsel that it was in contravention of article 1, section 19, which declares "private property shall ever be held inviolate, but subservient to the public welfare." This assurance found referred to comes from the collection of one-tenth of one per cent. of the value of all property registered under the law held in the county treasuries for the purpose of reimbursing persons who may have been deprived of their rights in any piece of property through fraud or otherwise. Counsel maintained that "to sustain the insurance feature of this bill would throw down the bars and place the property of the citizen at the mercy of cranks and fakes. If the state can go into the business of insuring land titles, it can go into the business of insuring anything else. It has no more power to insure land owners against loss by fraud or mistake in registration, than it has to insure the owners of houses against loss by fire, or citizens against loss by theft or burglary."

Another objection urged against the law is that registrations were to be required to be made without due process of law, in that it does not provide for sufficient notice to persons who may have interests in the property; when a person has registered his land and received his certificate, other persons who may be affected and have had no notice, are deprived of the rights of regaining their proper possessions, but must submit to reimbursements out of the assurance fund.

The brief in this case which was pre-

pared by R. A. Harrison and J. K. Richards, is very exhaustive, covering every section of the Torrens' law, and shows that the attorneys have spent a great deal of time in its preparation.

The attorneys who defended the law insisted that the objections interposed were more apparent than real. They showed that under the present system of recording there are real estate frauds and no system would be entirely free from them, but that the Torrens system of land transfers reduces such possibilities to the minimum.

#### INTERNATIONAL ACQUISITION OF TERRITORY BY OCCUPATION.

The rules of international law which are now regarded as practically settled, respecting the different methods by which a sovereign power is enable to take possession of, and hold, any particular portion of territory as against all other powers, are of comparatively recent origin. All the great nations of Europe have ever displayed a marked degree of covetousness when the control of different parts of the earth's surface has been in question, and this inclination attained its widest scope at the time of the discovery and subsequent colonization of the western continent. The movements of the various powers were at that time in nowise fettered by rules of law, or of practice, as has been, to a considerable extent, like undertakings in Africa during recent years.

When Alexander VI put forth his famous Papal Bull in the year 1493, respecting this question, and sought thereby to satisfactorily settle the dispute between Spain and Portugal, relative to the rights of those countries in the newly discovered parts of the world; and when this Bull was soon after ratified by the Treaty of Tordesillas, only to serve as a source of further complication in the international relations of the states concerned; the necessity for some more positive regulations, acceptable to all colonizing countries, was made most apparent.

By the edict in question it was decreed that all lands west of a line drawn from pole to pole, one hundred leagues to the westward of the Azores, not al-

ready secured to some Christian state, should belong to Spain, and that all such lands east of the line should be possessed by Portugal; free from interference of any kind on the part of any other power. The result was, however, that not only did the other nations of Europe refuse to accede to the Papal decision, but the parties immediately concerned in same—Portugal and Spain—never arrived at a conclusion between themselves as to the precise boundaries laid down in this Bull. For centuries after its promulgation claims were made at various times based upon this attempted arbitration, but were never suffered to prevail by Great Britain, Holland, or any of the other great colonizing nations of Europe.

According to the claims of Spain and Portugal the mere discovery of lands previously unknown gave to the discovering power a title to such lands which could not be wrested away by other nations through subsequent occupation and settlement. Discovery and conquest were the two principal methods then in vogue of acquiring new territory; title to lands was obtained and lost through the costly medium of force, and this system was supplanted only by the gradual growth of a few broad principles of international law, recognized to a greater or less extent by the European powers.

At the present day five modes of territorial acquisition, by a sovereign power are recognized, namely: by occupation, by conquest, by prescription, by cession, and by accretion. Of these only the first will be here considered.

While it is undoubtedly true that at an early date mere discovery gave a good title, such is no longer the case. "The authorities on international law now combine in laying it down with one consent, that discovery in itself gives no title, and even temporary occupation will suffice to create a title merely inchoate; that occupation to be valid must be effective." (*The Science of International Law*, page 160; Thomas A. Walker, London, 1893.) But it may also be said, that notwithstanding the truth of this statement it is also correct to say that a nation claiming title to certain territory will greatly fortify such claim if it is

possible to show discovery of the land in question by the claimant. Discovery, therefore, serves to confirm subsequent occupation by the discovering power.

However, discovery in order to be of any avail for this purpose must not be concealed from the knowledge of the world at large. Timely notice should be given of its pretensions, by the nation claiming the inchoate title by discovery which claim is bound to be respected by all the world, and a reasonable time after discovery is then allowed a nation wherein to perfect its title by acts necessary to be performed subsequently. Although it is true that there can never be, strictly speaking, a re-discovery of any territory, still, should the original discovery be concealed by a nation from its neighbors, any of the latter upon making a discovery of the land for itself, previous to a notification of discovery on the part of the former nation, would take a title superior to that of its predecessor.

The two inseparable factors in the acquisition of territory by occupation are annexation and settlement. The formal act of the state, whereby it claims sovereignty over the territory in question, constitutes annexation of same; and here according to an American writer (*The Principles of International Law*, p. 148; T. J. Lawrence, Boston, 1895), a difference is to be noted between discovery, and annexation, in that discovery such as is necessary to give to a state a good right to perfect its claims may be made by any subject of the state whether officially connected with same or as a private citizen; while annexation can never be brought about by a private individual, and any acts of his in that direction are incapable of ratification by the state. This author holds that to constitute a valid annexation the formal act whereby the territory is acquired must be performed by a state official especially authorized so to do, or by some state representative not having such special authority, but whose act is subsequently ratified by the home government. Regarding this contention it has been suggested that on principle an annexation capable of ratification might as readily be made by a private citizen of the ratifying state as by anyone else, thus applying to this situation rules of

law similar to those accepted in municipal law, whereby the acts of a person in behalf of another, wholly without authority, may by ratification be made as effective as if done under an existing agency. In the absence of any decisive holding on this point it may be considered an open question. Whether the territory annexed be inhabited or not, the procedure is the same, and rights of the natives need not be taken into consideration, so far as international rights and obligations are concerned. From this it follows, that where one nation has secured title to lands by annexation and settlement it cannot be disturbed in such possession by any other nation by virtue of rights claimed to have been acquired through direct negotiations with the native inhabitants of the territory in question.

Within a reasonable time after discovery and annexation the title to the territory must be perfected by settlement, which must be a real and permanent occupation. A mere formal attempt at settlement will not suffice, but it must be actually carried into effect and maintained continuously. From this it does not follow that every cessation of occupation will destroy the title held by a nation. Just how long a break in the occupation is necessary to constitute an abandonment is not settled definitely; but where the intention exists to re-occupy territory temporarily given up, and such intention is duly manifested, an abandonment will not be presumed until a considerable length of time has elapsed. In the case of the Delago Bay dispute, England and Portugal both laid claim to certain territory at that point, the former basing its claim upon negotiations that had taken place between that country and the natives, while Portugal put her pretensions upon the grounds of original discovery and subsequent occupation. Great Britain contended, however, that Portugal had lost control of the territory about 1823, during a native insurrection, and that this temporary cessation of dominion constituted a break in the required continuous occupation, sufficient to establish an abandonment. The matter was finally submitted to the French government for arbitration, and its decision was given in favor of the claims

of Portugal, on the ground that the comparatively brief termination of Portuguese sovereignty was not of sufficient weight to cancel the several centuries of occupation preceded by discovery.

As already indicated, mere discovery gives no title. So, too, settlement alone, without previous discovery, may not give an indefeasible title; but when discovery and settlement are combined within the proper period of time, a perfect title is the result; and in a case where title to territory is claimed by one power on the ground of settlement, while rights to same are sought to be enforced by another nation by reason of discovery, the latter power may be estopped to assert its claim by reason of laches in failing to follow up the discovery by acts necessary to the acquirement of a good title.

Having considered briefly the formalities necessary to be observed in the procurement of a title to new territory, the query arises as to the exact extent of the domain which may be thus claimed, and at this point have risen, and are still arising, some of the most important questions, to the solution of which rules of international law are applicable, namely: questions of boundaries between adjoining sovereign nations.

The proposition has probably never been disputed, that a colonizing power is not limited in its claims to the precise area really occupied by its posts and settlements. The establishment of such a colony and the maintenance of same carries with it a right to assert dominion over an expanse of territory stretching away, possibly, for hundreds of miles from the comparatively insignificant tract really occupied. This question may arise under a variety of circumstances, but the usual conditions may be divided into four classes. First, where a part of an island is occupied; secondly, in case of the occupation of a portion of seacoast; thirdly, where the banks of a river are occupied at its mouth; and finally, cases where settlements are made in the interior of a new country.

And first, as to a post established on an island. Here there can be little doubt as to the right of a nation to claim sovereignty over the entire island where it is of ordinary size. A question may

arise, however, in the case of an unusually large island, where a nation confines its operations to but one locality. If another power should plant a colony in a remote part of the island it is altogether probable that the first power would have no reason for objecting to a division of the territory, if it had never proceeded to exercise positive dominion over the entire extent of the island. In a case where two or more such settlements have been made by different powers on an island, the same principles would be applicable to determine the true divisional line between them, as are applied to similar situations on the continents.

Greater difficulty is experienced when the question of boundaries arises between states planting settlements at different points along the coast line of a vast continent. In the occupation of North America by the several powers of Europe, claims of unprecedented dimensions were put forth; it being long contended that a settlement and occupation of any portion of the Atlantic coast carried with it a right to hold as the domain of the colonizing power an extent of territory measured in width by the coast line occupied, and extending across the continent to the Pacific. This doctrine, however, could hardly survive the reducing to actual possession of those tracts of country then altogether unknown, and at present no such ideas are entertained.

When a settlement has been made on a portion of the seacoast it is now considered the right of the power making same to claim jurisdiction over the coast so occupied, together with such an extent of the interior country as is drained by the rivers emptying into the sea within the occupied country; in other words, the territory extending back from the coast as far as the watershed. It has also been suggested that "the extent of coast must bear some reasonable proportion to the territory which is claimed in virtue of its possessions." (Hall's International Law, p. 110, London, 1895.) As an explanation of this so-called "Hinterland Doctrine," mention may be made of the fact that in nearly every case of the occupation of a new country settlements are first made along the coast, and the only practicable way of

reaching the interior country being by means of the navigable rivers, it is easy to see that the nation exercising sovereignty over the coast should hold the key to the interior parts of the country, through its control of the rivers emptying within its borders, and by its right to debar other powers entering such rivers, be able to exercise exclusive dominion over the country penetrated by them.

The foregoing method of determining boundaries can be easily put into practice where one power alone forms settlements upon the coast in the vicinity of certain streams, but where two or more nations colonize stretches of seacoast at no great distance from one another, the doctrine that each may exercise dominion over the territory drained by rivers debouching within its line of coast cannot be strictly applied, as the areas of country thus drained are often very difficult of ascertainment. It has been the custom where this condition of affairs existed to establish a point upon the coast, midway between the most advanced posts of each power, a line being then drawn straight toward the interior from this point as the established boundary line. This is the plan usually adopted in the absence of any so-called natural boundary, *e. g.* a river, or a mountain range. If such natural boundary exists at some point between the frontier posts of the different nations, even though it be not situated at the middle point between them, it has often been constituted the division line. An exception to both these methods of demarcation may arise, however, where two powers have occupied portions of seacoast and a dispute arises as to the control of certain territory left unoccupied between the different settlements, and where absolute dominion of the disputed territory is necessary to the security of one or the other of the powers, and not essential to the other. Here the doctrine of the right of self-preservation will often prevail giving to the former power possession of the intervening country.

A somewhat different query arises where a colony is established only at the mouth of a great river, no effort being made to subjugate any extent of the sea-

coast. If the river itself be navigated and explored and dominion be exercised over the territory along its banks there would probably be little question as to the proper application of the principle giving to the settling power the territory drained by the river. The difficulty arises where no attempt is made to go beyond the mouth of the river, and a claim to the right to exercise sovereignty over the country back to the watershed, merely on the ground of the occupation of the river mouth, is probably ill-founded. This question arose in the controversy between Great Britain and the United States over the boundary line between this country and the British possessions bordering on our North West Territory, the United States claiming a right to all the territory drained by the river Columbia by virtue of a post established at its mouth. Great Britain, however, retained control of the territory surrounding the upper waters of this river, thereby indicating that the principle sought to be applied by the United States did not obtain as a part of international law.

Still another phase of this territorial question comes to view where a power effects a settlement in the interior of a country—say on the head waters of a stream, but does not extend its explorations and occupation to the river mouth. When, at a later date, another power establishes posts on the coast and at the mouth of the river, the inquiry as to the correct boundary line between the two powers calls for some new principles. This question seldom, if ever, arose during the earlier centuries, for the reason that access to the interior portions of a country could only be had by means of the rivers penetrating it from the sea-coast. In this age, however, and especially on the African continent, the question is a very important one, since considerable use has been made of railways in pushing forward effective occupation, and the principles to be applied in the eventual parceling out of that country are yet to be determined.

Notwithstanding the general disposition to yield assent to the comprehensive principles referred to, on the part of the leading powers of the civilized world, and the comparative ease of applying

such principles as cases arise, there still remains ample opportunity for the framing of additional laws. Chief among these is the answer to the query: What constitutes occupation? This investigation, in any particular instance, involves almost exclusively historical research, and as a timely example mention may be made of the labors of the members of the Venezuelan Boundary Commission. Months have been spent in an attempt to unravel and put into intelligent order the various accounts of numerous explorations, establishments of military posts, attempts at settlement, attacks and counter-attacks, indulged in by the disputing nations and their grantors. After this work has been satisfactorily completed the solution proper of the dispute should be comparatively easy; when, by the application of the accepted principles of international law, to the facts as found, the commission can be in a position to report its finding on the "true divisional line between the Republic of Venezuela and British Guiana."

This late situation of affairs, whereby two of the greatest of modern powers were placed in such strained relations for a considerable length of time, serves to re-emphasize the great importance of establishing certain fixed and universally accepted rules, to be employed in the peaceful settlement of all international differences.

## SUPREME COURT OF OHIO.

### Official Record of Proceedings.

#### General Docket.

Tuesday, April 20, 1897.

4215—The Citizens' Savings and Loan Association, of Akron, O., v. William Taylor, Son & Co. et al. Error to the circuit court of Summit county. Judgment of the circuit court affirmed. This cause was orally argued to the second division and considered by the whole court. Minshall, J., dissents.

4297—The Christian Moerlein Brewing Co. v. Lottie Swan. Error to the circuit court of Jackson county. Judgment affirmed. This cause was argued orally to the second division and considered by the whole court. Shauck, J., dissents.

4433—The Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Minnie G. Brinkerhoff. Error to the circuit court of Richland county.

Judgment affirmed on ground stated in the journal entry. This cause was orally argued to the second division and considered by the whole court.

4447—The Paige Manufacturing Company et al. v. the Commercial National Bank, of Cleveland. Error to the circuit court of Lake county. Judgment reversed. Grounds stated in the journal entry.

4448—The Paige Manufacturing Company et al. v. the Painesville National Bank, of Painesville, O. Error to the circuit court of Lake county. Judgment reversed. Grounds stated in the journal entry.

4570—Benjamin F. Wells v. Henry H. Bricker. Error to the circuit court of Medina county. Judgment affirmed on the authority of Chilcot v. Conley, 36 Ohio St., 545.

4580—Charles F. Sperry et al. v. Greenville J. Lowther et al. Error to the circuit court of Morrow county. Judgment affirmed.

4583—R. B. Mahaffey et al. v. A. C. Rogers et al. Error to the circuit court of Cuyahoga county. Judgment affirmed.

4888—The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Mathew Johnson. Error to the circuit court of Cuyahoga county. Judgment affirmed.

4920—Henry T. Chittenden v. Marcus Barclay. Error to the circuit court of Franklin county. Dismissed by consent of plaintiff in error at his costs.

5272—Walter Plummer v. the State of Ohio. Error to the circuit court of Williams county. Judgment affirmed.

#### Motion Docket.

2909—Charles E. Page v. John F. Pogue, agent, et al. Motion by defendant to dismiss as to certain parties in cause No. 4727 on the general docket. Motion sustained.

2910—Hiram P. McKnight v. E. G. Coffin. Motion by plaintiff to advance cause No. 5263 on the general docket. Oral argument requested. Motion allowed, cause advanced, and request for oral argument noted.

2911—James Richardson et al. v. Anna A. Gierhart. Motion by plaintiff to dispense with printing record and to use record in cause No. 5455 on the general docket. Motion allowed.

2912—The State of Ohio ex rel. William G. Ward, sheriff, v. James C. Russell, as probate judge. Motion by plaintiff to advance cause No. 5414 on the general docket. Passed until printed record and brief for plaintiff in error shall be filed.

2914—The City of Cleveland v. Catherine Moran, administratrix. Motion by defendant to advance cause No. 555 on the general docket. Motion allowed.

#### New Cas. s.

New cases filed in the supreme court since April 7, 1897.

5521. William Bahmann v. Richard S. Stoner. Error to the circuit court of Hamilton county. Aaron W. Ferris, for plaintiff.

5522. Capper V. T. Hopple et al. v. The City of Cincinnati for etc. Error to the circuit court of Hamilton county. Burch & Johnson and William M. Ampt, for plaintiffs. F. W. Brown, for defendant.

5523. Se'ah Daniels, admr. v. Henry P. Sanford, receiver. Error to the circuit court of Lake county. N. H. Bostwick, for plaintiff. L. J. Woods, for defendant.

5524. John A. Chilcote v. State ex rel. May Ida Hodgkins. Error to the circuit court of Licking county. Kibler & Kibler, for plaintiff.

5525. The City of Cleveland v. Catherine Moran, admx. Error to the circuit court of Cuyahoga county. Miner G. Norton and Phillips, Ford & Crowl, for plaintiff. Foran & Dawley, for defendant.

5526. The City of Cleveland v. William Baldt. Error to the circuit court of Cuyahoga county. Miner G. Norton and Phillips, Ford & Crowl, for plaintiff. Billman & Billman, and H. H. Poppleton, for defendant.

5527. The City of Cleveland v. The Cleveland Electric Ry. Co. Error to the circuit court of Cuyahoga county. Miner G. Norton and Phillips, Ford & Crowl, for plaintiff. Squire, Sanders & Dempsey for defendant.

5528. James A. Reis' et al. v. The Greenville Gas Co. Error to the circuit court of Greene county. Anderson & Bowman, for plaintiff. Knox & Robeson, for defendant.

5529. John R. McLaughlin et al. v. James A. Miles. Error to the circuit court of Franklin county. S. A. Webb, for plaintiff. E. L. Taylor, Jr., for defendant.

5530. L. Vern v. Fanny Jamison et al. Error to the circuit court of Brown county. G. Bambach & Son, for plaintiff. W. D. Young, for defendant.

New cases filed in the Supreme Court since April 14, 1897.

5531. William Kiefaber et al. v. George Ellithorp. Error to the Circuit Court of Franklin county. Walter B. Page, for plaintiff. S. C. Jones, for defendant.

5532. Lydia Hadlow et al. v. William H. Beavis, Exr. Error to the Circuit Court of Cuyahoga county. L. Prentiss, for plaintiff.

5533. Henry O. Dorsey et al. v. Josephine M. Fulton. Error to the Circuit Court of Licking county. C. & C. H. Follett, for plaintiffs.

5534. John H. Kunneke v. Thomas J. Mapel. Error to the Circuit Court of Ottawa county. Handy & Ogen, for plaintiff. Beiley & Beiley, for defendant.

5535. Ann Jane Campbell et al. v. Charlotte J. Simington, Admx. et al. Error to the Circuit Court of Mahoning county. King, McVay & Robinson, Volney Rogers and C. D. Hein, for defendants.

5536. Haunah Power v. The State of Ohio. Error to the Circuit Court of Franklin county. N. W. Dick and M. B. Earnhart, for plaintiff. J. H. Dyer and F. S. Monnett, for defendant.

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## OHIO STATE REPORTS.

Volume 54, **Ohio State Reports**, is now ready for delivery, and may be obtained at \$1.50 per volume, payable in advance.

Judge Ferris, of the Hamilton probate court, in the matter of the estate of Wm. J. Ormsby, held that half brothers are exempt from payment of the collateral inheritance tax.

The supreme court of Iowa has passed upon the meaning of the word "swipe". That grave, dignified and august tribunal in affirming the case decided that "swipe" means to steal, and cited the dictionary as its authority.

A sale is not a fraud of creditors where there is no secrecy about it, and the purchaser does not know that the sellers are insolvent, or are attempting to defraud, and has not such information as should put him on inquiry. *Simmons v. Shelton*, (Ala.), 21 So. Rep., 358.

In the case of *Lammers v. Hamilton County*, Judge Jelke, of the Hamilton common pleas, held that, as to Hamilton county the action must be dismissed at plaintiff's costs, because the plaintiff has sued nothing. Hamilton county not being a legal person, either natural or artificial, capable of suing or being sued. A county is a local political subdivision of the state, created by the sovereign power of the state without particular consent or concurrent action of the people who inhabit it.

In an action by a pledgor against a pledgee for the conversion of a pledge given in lieu of a bond to secure the performance of a contract, a recovering will be defeated by proof that there was a breach of the contract, by which defendant sustained damages in an amount greater than the value of the pledge, and that he sold the pledge for its full value, and gave plaintiff credit for the proceeds. *Reardon v. Patterson*, (Mont.), 47 Pac. Rep., 956.

The tuberculin test of the animals from which milk is obtained is held, in the case of *The State v. Nelson*, (Minn.), 34 L. R. A., 318, not to be unreasonable; and an ordinance requiring such test as a condition of a license to sell milk within the city is sustained.

Where a mortgage is given to secure an antecedent debt, it is not prior in lien to a judgment entered the same day on which the mortgage was filed though the judgment entered was not filed until after the filing of the mortgage, but will pro-rate with the judgment. *Goetzinger v. Rosenfeld*, (Wash.), 47 Pac. Rep., 882.

Dr. Byron E. Ottman, a young specialist, who was indicted at the September term of the Franklin county grand jury, on the charge of making a perjured affidavit before the state board of medical examiners and registration, filed a motion to quash the indictment thus assailing the constitutionality of the law creating the board. The motion was argued at length last week and on Monday of this week, Judge Pugh gave his decision sustaining the law in every respect. This is the first decision on the constitutionality of the law and promises to become historic. The decision was quite lengthy and decided the various points raised by Ottman. The only point upon which the court was not clear was the one relating to the law's application to physicians having no legal residence in the state. The gist of the court's decision was that the legislature, had the police power of regulating the practice of medicine in the interest of the citizens of the state.

#### CONFISCATION OF FISHING NETS.

Judge Ong of the Cuyahoga common pleas court, made an important ruling Tuesday of this week, in the trial of a case growing out of the seizure of a number of fishing nets by the fish wardens in Lake Erie, in 1895. The owner of the nets commenced suit in replevin against the fish wardens and the owners of the tug which the wardens used. The nets

were not recovered by this process, and thereupon the owners commenced an action in the common pleas court to recover the value of the nets taken. The attorneys for the defendants maintained that under the law, plaintiff could not recover for the seizure of fishing nets taken while the plaintiff was engaged in unlawful fishing. They declared that the law allowed the confiscation of fishing nets under the circumstances.

In charging the jury in this case Judge Ong plainly told them that neither the warden nor any one else had the right to confiscate the nets. He declared that any law which allowed the confiscation of nets was unconstitutional. He further said that under the law the state could confiscate the property of a citizen without condemnation proceedings. Such a law, he insisted was against the state constitution, and the United States constitution, in that it allowed the confiscation of private property without due process of law. With this instruction in mind the jury rendered a verdict in favor of plaintiff for the value of the nets confiscated.

That part of the law which Judge Ong declares to be unconstitutional is as follows:

"No person shall draw, set, place, locate, or maintain any fishnet, trap, pound net, seine, gill nets, or any device for catching fish, as is by law forbidden; and any nets, seines, pound nets, gill nets, placed, located, or maintained in violation of the provisions of the laws of the state, shall be taken wherever found by the fish wardens or other proper officer; and all such nets and other devices for catching fish are hereby declared a public nuisance and shall be forfeited to the state.

"It shall be the duty of any warden, deputy warden, inspector of fish, sheriff, constable, special warden, or other officer having jurisdiction, forthwith to take up such nets, devices, and articles hereby declared a public nuisance, when found or taken in unlawful use, and hold the same until disposed of according to law.

"In such prosecutions \* \* \* the court shall, upon conviction, adjudge in addition to the fine and costs by law imposed the forfeiture of such nets."

### THE LAWYER AND HIS RELATIONS.

[Address of W. W. Guthrie of Atchison, before the Kansas State Bar Association.]

It may be said that we all understand what the "terms" the doctor and his relations, the preacher and his relations, the teacher and his relations, as well as the artisan, tradesman and farmer and their respective relations, imply, without extended consideration of the subject, but can as much, or rather as little, be said of the lawyer and his relations; and if not, wherein can be said to be the difference? The several "callings" are recognized as constituent parts of a common whole, but do they, or any of them, occupy a "plane" common to that of the lawyer?

That each "calling" must sustain some relation to every other, and at the same time has relations within itself, goes without saying. Then, why should the lawyer's calling in its relations occupy a plane individual from the others? Even in the farmyard the brute do not occupy a common plane in their relations. Some are content with a corner, while some are not satisfied with all that their confines will admit of, and this without regard to breed, class or habit.

There are those who believe—and not without much cause—that the influence of association during their sojourn in Noah's Ark produced a blending of the leading characteristics of the human and brute creations creative of individual conveniences productive of strifes not disposed to amicable adjustment. I do not rely much upon Nebuchadnezzar's taking to grass in one of his moods—as better illustrations are not at command.

Among the "callings" are classed the mechanical, agricultural, mercantile and professional, to which the lawyer is generally assigned, but it would be more befitting to term it "mixed."

The doctor's calling is professional, with his opportunities practically within its individual relations. His practice—rather his business—disposes him to short office consultation and long-distance calls, which incline to make him a patron of good horses; but this is not going outside of his profession—to him it is strict-

ly business. While ambitious, his profession is his all. Only the "camp follower" sticks his nose into other people's business. He ought to be generous in this respect, for he has advantages which it would be undesirable to him to have other people stick their nose into. Then, he can carry on his business by "piece work," with a fixed scale of prices. He is more independent, if possible, than his next door neighbor—the undertaker. When he should be so contented it is a wonder why his profession should so often be the "gateway" to even eminence in the legal profession.

The preacher's calling is also professional. He is a very good man, or he isn't. There is no neutral ground to him, unless in cases where otherwise he would have found difficulty in getting any sort of ground, and when such cases are found, it may be safely inferred that no "lantern" was needed. There is, perhaps, as great a variety in his profession as in any other calling. His opportunities are many that others would not "throw over their shoulder." The worst that may be said of him, from a worldly view, is, that he is too unselfish for his own good. From tendencies of late, this difficulty is in a fair way to be overcome. Up to this time his is the hardest worked, best fed and poorest paid of all the professions; but if he fail in his profession, as a last resort, politics is open to him.

The teacher's calling is professional—if it is anything; but of this there is much doubt. It is more a "finger-board" which points to forks in the road—leading to law, theology and medicine. I have often thought of the number of good school teachers spoiled, and the world of usefulness "frosted" in its budding stage by their taking the wrong road, or probably in striking for the big road at all.

True it is that there is a good deal of fascination in the idea of having more room, but it is a mistake to take the big road until fairly sure of being able to escape being run over.

But the suggestion may have occurred as to what all this has to do with the lawyer and his relations.

The rule for the general treatment of a subject is, I believe, that the further

the speaker keeps from his subject, the more appropriate his discourse is supposed to be, and in so doing there is the advantage of escaping pointed criticism. But at the risk of criticism, I have determined to keep outside this rule. It has been with the belief that the environment of the subject should be first considered that some reference has been made to some of the callings with which the lawyer's relations outside of his immediate own are the most nearly connected. It must have been observed that the prevailing custom of modern politicians—even where marriage is deemed a proper preliminary step—of providing first for the nearest "relation" has not been followed; and in so doing I trust that it will not be thought that this has been done merely to defy public opinion.

Then, if in fact the other callings are a part of the lawyer's relations, why should they not be the subject of conservative reference before coming into the lawyer's immediate presence, and particularly when his existence is so largely drawn from, and his persistence so largely bestowed upon, the "learned professions," with which I have not strictly classed him for the reason that the legal profession is a sort of a "house of refuge," where the "failures" in every other calling may go with full confidence that there will be found congenial company, with a prospect of a turn in his fortunes; and, justly to himself, reasoning that he can be no worse off, for since so many bigger blockheads than himself have got along, the show is certainly good for him. Education is neither a serious objection nor a necessity—as witness the ordinary committee examinations for admission to the bar. Even that the applicant's character is "shaded" does not usually count. Bar committees show little disposition to refuse a certificate of "good character and legal requirements," even when fully satisfied that their report will put a "tramp lawyer" on the road. What the excuse may be matters not; the result ought not to be. The trouble here, and all along the line, to a greater extent in the legal profession than elsewhere, is the "shirking" of self-imposed responsibility, which comes from diluted man-

hood. Cowardice—really but another name for selfishness in public affairs—is a lame factor. It never pays in the long run. For a time it may be easy sailing, but just when the "shirk" most needs support a greater "dodger" appears in his path, and down he goes. The manly man, and particularly the manly lawyer, gets the most out of his career. He may not be known for a time, but "fast colors" are sooner or later discovered.

Overproduction is a term quite applicable to the legal profession from a good way back. Where the few thrive, a large per cent. starve, and the "betweens" hover near the "ragged edge." What else should be expected where the many can't see, and those who can delude their blinded brethren with the fallacy "that there are as many rounds in the ladder at the top as at the bottom." It is not so much where the rounds of the ladder are, as to reach them.

Very naturally, the opportunities are not all equal. That we cannot all grow to the same size may not be the fault of the individual, but "kicking" about it will only prove misapplication of energy. But there must be something wrong when lawyers can draw salaries from five to twenty times larger than those of the judges before whom they are supposed to earn them. Unless the result of favoritism, a remedy should be within the influence of the profession.

When the large business interests are the subject of assault—by guerilla, mine and siege, and the effect is made through legislation to "iron-clad" against any defense—it is to be expected that such interests should employ every means for their protection, without regard to cost. There are many ways of preparing for a trial without hypnotizing witnesses; and in no calling can greater talent and quick perception be found. There can be found those who will say that the lawyer who will sacrifice his private interests to become mayor of his city is true to his profession; but there are other ways in which he may serve his client besides assisting in filling the jury box of his county. In an equally, if not more serious view, I assert that wherever the blame lies in the first instance, the corporation and anti-corpora-

tion war in this state has reached such a pass that all fairness seems to be out of the question; and will grow worse, if possible, until judicial integrity may become a thing of the past.

Stealth is not due order, nor is vengeance justice. Judges are not the creation of spontaneous growth; nor is irrigation successfully practiced by the tearing away of the reservoir.

With our legislatures so largely made up of lawyers, is ought else needed to secure reform in this respect but to improve the quality until a "public trust" shall not be exercised as a "private snap?"

There should also be a stop put to public positions being created to be filled by their "creators," or wet nurses; and even a governor's message has been known to prove a failure. When the people can believe that the term "lawyer" cannot mean trickery, there will be no fear of the lawyer, by apparently unanswerable argument, being found demonstrating wherein the truth lies.

The lawyer in his relation to the public and his profession has it within his power to be a benefit, without the taint of being a pest. Legislation can be formulated through the profession for its improvement, which will be beneficial to the "state!" but it must be what it seems to be, and in which the public is not left largely out of consideration. No man's hand should be raised against the lawyer, nor will be when his hand is not raised against his fellow man. No inquiry of the lawyer should be answered, "Am I my brother's keeper?" With the advantages which the lawyer has, he should be not less than his "neighbor's friend."

There is too much litigation; too many courts; but continually the cry is for more, upon the pretense that it is a denial of justice not to keep up with the business. Every new court is a fresh incentive to litigation. Better courts will produce less courts. Instead of increasing the courts, increase the efficiency of the judges. It should no longer be said in jest, "Let the next fellow guess at it." There is too little respect felt for the courts. Is the public to be blamed for it?

It has come to be so that the formality of an application for admission to the

bar is not preliminary for candidacy for the bench. As one may be an officer without being a soldier, so there may be a "judge" without being a lawyer. I have known cases, however, where I thought the innovation was an improvement, but I doubt if it is a safe rule. But such a court is better than the "cuspadore" kind.

With the courts sitting nearly the year round, what is to be done; what interest benefited? Not usually the litigants' when the "salvage" falls below the invoices; not the lawyers' for the clients have nothing left to pay the fees; not the officers', a large share of whose fees rest upon "pauper affidavits," with a chance shot only now and then at a defendant discovered to be well-to-do; not the public, for the taxes for court expenses have become a fair rental.

The expense is out of all proportion to the benefit of the courts, which are in reality not less than 75 per cent. training schools in course after the university.

I have classed the lawyers as a mixed profession. What does it not lead to? Into every other "gloved" calling, except the ministry, medicine and teaching, where the sliding scale is the other way; and once a lawyer always a lawyer is a belief as deep rooted in him as is his religion in the discipline of Confucius, teaching him that it is not safe to his spiritual welfare for his body to be buried outside of the Celestial Empire.

In branching out, he naturally looks toward that which seems the nearest in accord to him; and, notwithstanding the many "horrid examples" which flit across his path, he very naturally takes to politics. There seems to be such an inclination of "oneeness" of the lawyer and politics that too generally they can no more be kept apart than steel and the magnet. I can see why the lawyer holding on to a large salary by uncertain tenure should aspire to the legislature or city council, for it is in the line of his profession; but why the lawyer, who, but, for the "credit" system, could scarcely keep the wolf from his door, should make a business of that which has more certain failure in its outcome than dealing in options by telegraph, passeth my understanding. If content with local politics, he may have his ups and downs,

and go on "forever;" but if he aspire to statesmanship and get out of a job, he is as bad off as the shipwrecked mariner on a coral island, whose surroundings, while beautiful to look upon, are without bread and water at hand, and who, with only a chance that a ship may come that way before death relieves his anxiety, never relaxes a vigilant eye on the political horizon, and never realizes that after political death there is no resurrection. Necessarily his relation to the "law" is only nominal during this state. Clay and Webster did not belong to this class, nor did William M. Evarts, a great lawyer, but as a statesman a cipher.

There are others who try to combine active business pursuits with active law practice; but, like other partners, where each is relied upon to support the other, the firm usually goes into the hands of a receiver.

There have been cases where genius has put its possessor in the lead. These were accident, and were before the discovery of the "case" lawyer. Perhaps it cannot be helped now; but it would seem to be an ill-sorted arrangement where the "baggage wagon" counts for more than the "coach."

Some there be who feel that with the diploma the lawyer is a completed job, and thenceforth all that is needed to invite fame and wealth to his door is to devote himself to the cultivation of an acquaintance. To be known as a "hail fellow well met" is by far too generally the recognized "short cut" to success; but led up to by cards and their incidents, it is most often found that this short cut is the mistaken road.

The lawyer's diploma is the beginning of his apprenticeship, and upon its service depends the craftsman. If stunted in his start by bad habits, bad associations, want of integrity, or wandering off after "strange gods," all not infrequently going hand in hand, he has lost time which can never be made up.

If just to himself, there is abundant natural stimulant without having occasion for resort to artificial.

"Steaming up" for a great effort is "making haste slowly." There is no gauge on the "steamer," and if absent when wanted the "craft" is out of commission.

Law is the greatest of the learned professions. In it is to be found position, fame and abundant means for the accumulation of legitimate wealth without the "parting of the raiment" of corporation in "chancery," or their robbery at "law" through prejudiced verdicts. If the greatest, it must be the hardest working profession, calling for the most severe discipline of the best order of talent and the highest degree of integrity, set in unblemished lives. Its disciples should stand in the front in every community by common consent. As his opportunities are the greatest, so should be his influence. It is the calling much more than all others to which the masses look for leadership, and should not be found wanting.

Every member should feel that it is the most honorable calling, and a privilege to die in the harness. It is the calling for which a Dennis Kimberly refused to accept an election for a full term to the United States Senate, and for which a Geo. F. Edmunds resigned an honored seat in that distinguished body.

It is the calling which, with the same degree of care, application, integrity and judgment as given to other callings with successful results, makes for the bright young men of Kansas, who will give to it their best efforts, the vantage ground.

It is the office of this association, to do its part well, and only when nothing has been left undone, will its full duty have been performed to "the lawyer and his relations."

## SUPREME COURT OF OHIO.

### Official Record of Proceedings.

#### General Docket.

COLUMBUS, O., April 5.

4087. Charles S. Paddock v. Samuel E. Adams and Henry H. Holly, Executors of Thomas S. Paddock. Error to the circuit court of Cuyahoga county.

WILLIAMS, J.

1. Where the father, being owner of the equitable estate in land directs the conveyance of the legal title to his son in trust for the father, and in the deed the grantee is designated as trustee, both the deed and instruction for its execution are competent evidence to

prove the trust, in an action for its enforcement against the son who denies the trust, and claims the conveyance was a gift or advancement.

2. An action to enforce such a trust is not an action involving the validity of the deed, within the purview of the last clause of section 5242, Revised Statutes; and where such action is prosecuted by the executor of the cestui que trust, the adverse party is incompetent to testify to matters occurring before the death of cestui que trust.

Judgment affirmed.

4563. William F. Roberts v. Uretta Remy et al. Error to the circuit court of Richland county.

WILLIAMS, J.

1. In actions coming within the second exception contained in section 5242, of the Revised Statutes, when the agent through whom it is claimed a contract was made by a person since deceased is himself a party, his testimony is subject to the same tests of competency that are applicable to the testimony of other parties who sustain the same relation to the issues; and where, as a party, he is adverse in interest to one who claims or defends as devisee of such deceased person, he is not competent to testify as a witness against the devisee, either to his own agency, or to the alleged contract; nor, in such case, are other parties having a like adverse interest competent to testify to such matters, as against the devisee.

2. While it will be presumed, in the absence of explanatory circumstances showing a different intention, that a conveyance of land to a child for a consideration furnished by the parent is a gift or advancement, there is no presumption that a gift is intended when the consideration is paid by the child and the conveyance made to the parent; on the contrary, in the latter case the presumption is, that the legal title was so placed in the parent, in trust for the benefit of the child, and the burden is on the holder of the legal title to overcome that presumption.

3. Where land is purchased with an undivided fund in which the parent has a life estate and the children the remainder, and the conveyance is made to the former, the title will be held in trust for the latter subject to the life estate; and upon the termination of the life estate they will hold the equitable title as tenants in common in the proportion of their respective shares of the fund.

Judgment affirmed.

4545. William Goodall v. The Gerke Brewing Co. Error to the superior court of Cincinnati.

MINSHALL, J.

A contract whereby premises are leased to be used as a place for the sale of intoxicating liquors, it is not necessarily invalid; and rent, in accordance with its terms, may be recovered thereon where it does not appear that the lease was made for the purpose of, or with the understanding of the lessor that it is to be

used for the unlawful traffic in intoxicating liquors.

Judgment reversed and cause remanded for further proceedings.

4416. Henry L. Brown, Ex'r., etc., v. Hannah Reed. Error to the circuit court of Huron county.

SHAUCK, J.

An executor who, in the exercise of a testamentary power to sell lands for the payment of debts in bad faith sells them for a price that is manifestly less than their true value, should, on exception to his account in the probate court, be charged with the difference between such inadequate price and the true value of the lands.

Judgment affirmed.

4512. The Mutual Aid Building & Loan Company v. William A. Gashe, Assignee, et al. Error to the circuit court of Lucas county.

BRADBURY, J.

1. Where, upon a sale of land, for a price payable partly in hand, the balance in installments, the title remaining in the vendor to be conveyed to the vendee upon full payment of the purchase price, the vendee is put into possession and proceeds to erect a building thereon, the lien of a material man for material furnished for such building touches the interest of the vendee only. This interest is the value of the property to be conveyed, including any improvements placed thereon, less the unpaid purchase money.

2. In such case the vendor's right to be paid the balance of the purchase price in case of a judicial sale of the property is paramount to the lien of a material man; and if he, for a valuable consideration, before a judicial sale of the property, conveys the legal title to another, the latter, thereby becomes vested with all the interest and rights of his grantor, the original vendor, and, by a mortgage, may convey to his mortgagee such interest and rights.

3. If, after such conveyance by the original vendor, and mortgage made by the grantee, the property is sold at judicial sale, the lien of the mortgage upon the proceeds of the sale to the extent of the unpaid purchase money, and to that extent only, is superior to that of a material man.

4. The circumstance that the third person to whom the title was conveyed and by whom the mortgage was executed, had no actual pecuniary interest in the transaction but was a mere conduit for passing the title and interest of the original vendor to the mortgagee, is immaterial.

Judgment modified.

4827. Wm. R. Ryan, Sheriff v. Root & McBride Bros. Error to the circuit court of Cuyahoga county.

At the January term, 1893, of the common pleas of Cuyahoga county, F. recovered a judgment against M., upon which execution was issued and certain goods and chattels of M. seized by the sheriff of that county. Shortly after, M. made a general assignment

for the benefit of creditors. Subsequently, at the same term of court, R. & McB. recovered two judgments against M. on which executions issued and were delivered to the same officer, with notice that those creditors claimed the right to *pro rate* with F. in the proceeds arising from the sale of the goods and chattels seized under the execution issued on the judgment of F. The sheriff did not levy the writs, but retained them *nulla bona*, and denied R. & McB. the right to *pro rate*. The sale realized a sum just equal to the judgment of F., and costs.

**Held:** 1. The goods and chattels of M., when seized in execution by the sheriff, were brought within the operation of section 5382, Revised Statutes, and no subsequent assignment by the debtor could have the effect to prevent the application of the proceeds of sale as directed by the statute.

2. The seizure under the writ in favor of F. ensured to the benefit of the subsequent judgment creditors, and no formal levy of the later executions was necessary.

3. Under the section cited the judgments of R. & McB. had equal rights with that of F., and it was the duty of the sheriff to distribute the proceeds of the sale to the several judgment creditors in proportion to the amount of their respective demands.

4. On refusal by the sheriff to perform this duty, and on his return of the execution *nulla bona*, an action for damages as for a false return was a proper form of action.

Judgment affirmed.

SHAUCK, J., dissents.

4332. H. P. Chapman, as Treasurer of Lorain county, v. The First National Bank of Wellington. Error to the circuit court of Lorain county.

BURKET, C. J.

In the administration of our tax laws, the holder of national bank shares has no right under the statutes, state and national, to deduct his legal bona fide debts from the value of such shares, but he is legally bound to pay tax upon the assessed value of such shares without deduction on account of such debts. Niles v. Shaw, 50 Ohio St., 370, followed and approved.

Judgment reversed.

4220. Mary Loretta Martin et al. v. Edmund Martin, Admr. Error to the circuit court of Brown county.

BY THE COURT:

The personal property of an intestate who leaves neither wife nor child passes to such of his brothers and sisters as survive him, and to the legal representatives of those who died before him, and children of a predeceased brother take in a representative character and subject to the indebtedness of their principal to the intestate. Judgment affirmed.

4288. Adolph Mahrer v. Root & McBride Bros. Error to the circuit court of Cuyahoga

county. Judgment affirmed on the authority of Ryan v. Root & McBride Bros. This case was orally argued to the second division and considered by the whole court.

4289. Adolph Mahrer v. Root & McBride Bros. Error to the circuit court of Cuyahoga county. Judgment affirmed on the authority of Ryan v. Root & McBride Bros. This case was orally argued to the second division and considered by the whole court.

4306. Emerson McMillen v. The Cleveland, Cincinnati, Chicago & St. Louis Railway company. Error to the circuit court of Franklin county. Judgment affirmed, one ground of reversal being that the verdict was against the weight of evidence. Other questions were not considered.

4370. The City of Cincinnati v. C. L. Rogers. Error to the circuit court of Hamilton county. Judgment affirmed on grounds stated in Stribley v. City of Cincinnati, 9 C. R., 122.

4561. The Jarecki Manufacturing Company, limited, v. The Adams Bros. Co. et al. Error to the circuit court of Hancock county. Judgment affirmed, Burkett, C. J., not sitting.

4574. Grayson H. Osborn v. Charles E. Morris, trustee. Error to the circuit court of Franklin county. Judgment affirmed.

4590. Frederick E. Tracy, trustee, v. George J. Deitrich et al. Error to the circuit court of Crawford county. Judgment affirmed.

4661. The Castalia Sporting Club et al. v. The Castalia Trout Club Company. Error to the circuit court of Erie county. Dismissed by consent of parties at costs of plaintiffs in error.

5403. Walter L. Warren, by, etc., v. The Columbus Street Railway Company. Error to the circuit court of Franklin county. Judgment affirmed.

5431. The Incorporated Village of New Lexington, O., v. James Hughes. Error to the circuit court of Perry county. Judgment affirmed on authority of Hirn v. The State, 1 Ohio St., 15, the affidavit being insufficient.

#### Motion Docket.

2913. George F. Cummings v. Montroeville D. Cummings et al. Motion by defendants to dismiss cause No. 5012 on the general docket. Supplemental printed record stricken from the files and the remainder of the motion is overruled.

2916. The Board of Commissioners of Wyandot county v. The State of Ohio ex rel. Pietro Cuneo. Motion by defendant to advance cause No. 5437 on the general docket. Motion allowed, cause advanced, and briefs to be filed within rule.

2918. The City of Cincinnati et al. v. The Board of Education of School District of Cincinnati. Motion by defendant to advance cause No. 5520 on the general docket. Motion allowed, case advanced, and briefs to be filed within rule.

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## OHIO STATE REPORTS.

Volume 54, Ohio State Reports, is now ready for delivery, and may be obtained at \$1.50 per volume, payable in advance.

The mere fact that a purchaser gives a check, in payment, on a bank in which he has neither money nor credit, is not a fraudulent representation that he has money or credit there, so as to constitute the offense of swindling. *Brown v. State*, (Texas), 38 S. W. Rep., 1008.

When two members of a corporation own the entire stock, and the corporation is indebted to each, but the indebtedness has not been reduced to judgment, neither of them has the right, as a creditor, to ask for the appointment of a receiver. *Wallace v. Publishing Co.*, (Iowa), 70 N. W. Rep., 216.

A bill in equity may be maintained for the recovery of letters written by the complainant to her son, and by her son to her, when the former were wrongfully taken by defendant from the possession of the son, and the latter from the possession of the complainant. *Dock v. Dock*, (Penn.), 36 Atl. Rep., 411.

Judge Davis, of the Hamilton common pleas court, held in the mandamus suit of Charles N. Bishop against the Chamber of Commerce to compel the latter to restore the plaintiff to membership, that a mercantile body has a right to make rules and regulation and set them up as a defense. The demurrer to the answer was overruled.

The Supreme Court has assigned the Cincinnati mayoralty suit for argument, Tuesday morning, May 11. Hon. Thomas McDougall and ex-Attorney General Richards appeared before the court on behalf of Mayor-elect Tafel and asked for an early hearing. Briefs have been filed by Colonel Tafel's attorneys, and the attorneys for Mayor Caldwell asked for two weeks in which to look them over and prepare answers to the points presented.

In the opinion of the court of appeals of Maryland, an electric light company is not a manufacturing industry, within the meaning of a city ordinance exempting from municipal taxation the "machinery and manufacturing apparatus of all manufacturing industries," that ordinance having been passed before the legislature classified such companies in the incorporation laws under the head of manufacturing companies. *Electric Light & Power Co. v. Mayor, Etc.*, 36 Atl. Rep., 362.

Last Saturday was Judge Moore's last day on the bench of the Cincinnati Superior court, which he has occupied with credit for ten years, preceded by a five-years' term as a judge of the Hamilton county court of common pleas. His jury upon being finally discharged last Friday, testified to their regard by presenting the judge with a handsome umbrella. The room was full of attorneys at the time, and there was a sincerity on the part of all present which so moved the judge that he was hardly able to reply.

Judge Hunt, of the Cincinnati Superior Court, held last Saturday in the case of the Consolidated Building & Savings Co., that the petition of the Board of Directors for a receiver and dissolution did not state facts sufficient to deprive the shareholders of the control and disposition of their property, especially without notice to or consent of the stockholders. That is, the only person entitled to apply for a receiver of a building association, in the absence of statutory proceedings, is a shareholder, who must sue in his capacity as a shareholder. The opinion, in view of the straightened condition of many building associations at the present time, is of unusual interest to all interested in such associations; we will publish the decision in full.

The first prosecution under the Garfield corrupt practices act will be commenced soon in Toledo, an order to this effect having been issued Thursday of last week by Attorney General Monnett. The alleged guilty party is a member of the board of education in that city. The charge made against the defendant was

that he made a false report of the expenses attending his campaign for the nomination and the election, and expended more than the law allows. It being charged that defendant expended \$239.25, while the law limits the amount the defendant could lawfully expend to \$100.00. The charge is also made that the defendant promised certain electors of his ward, in consideration that they worked and voted for his election, that he would secure positions for them or their friends in the public schools of the city.

Attorney General Monnett, in compliance with section 8 of the corrupt practices act, notified Prosecuting Attorney Charles E. Sumner, of Lucas county, to begin proceedings within ten days, to have defendant's office vacated and for any other relief given by the law. It is made mandatory upon the prosecuting attorney to begin the action.

#### FIRE EXTINGUISHERS.

Attorney General Monnett, Tuesday of last week, rendered an opinion on the subject of fire extinguishers, in which he holds that their use cannot be enforced on baggage and mail cars. The opinion which was in response to a request by railroad commissioner Taylor is as follows:

This department has the honor to receive a communication from you under date of April 27, asking for a construction of section 1 of an act to compel the introduction of fire extinguishers on passenger trains operated within and throughout the state of Ohio, especially desiring to know whether it should be so construed as to make it necessary to equip baggage, mail, express and sleeping cars with the extinguishers.

Section 1, or so much thereof as involves this question, reads as follows:

"Every company or corporation operating a railroad in whole or in part in this state, shall be required within one year from the passage of this act, to carry on every passenger train operated within or throughout this state, as part of the equipment of such train, at least one portable chemical fire extinguisher, for the purpose of protecting the lives of the passengers and employes from fire,

and that one portable chemical fire extinguisher shall be added each year thereafter to every train operated until every passenger coach comprising the train of passenger cars run on any of the railroads of this state, shall be supplied with a portable fire extinguisher as part of the equipment of said cars."

The purpose of the act is expressly stated as being for protection to the lives of the passengers and employees from fire. It does not aim to protect the property, mail or baggage. It speaks of "every passenger coach comprising the train of cars." The Century dictionary defines a passenger coach as one carrying passengers on a railroad. The term "coach," is used exclusively in connection with vehicles for the purpose of carrying passengers. It is true that employees occupy baggage and mail cars, but they also likewise occupy freight cabooses, and the peculiar wording of this statute has not yet gone so far as to require an extinguisher for any other than coaches actually occupied by passengers.

The federal statute provides for and enforces the carrying of fire extinguishers in mail cars independent of your department.

Without further express legislation, which would include baggage, express and mail cars, I would advise you to attempt to enforce providing extinguishers therefor.

#### CONTRACTUAL FREEDOM.

Entire freedom of contract is one of the matters as to which the adjuster has very decided convictions of its own. Goods, wares and merchandise, lands and tenements are desirable for what they will bring; money is desirable for what it will procure; but all these are valueless without freedom of contract. Whenever two or more parties meet on equal terms, and bargain together, the real character of their bargain, whether complex or simple, whether wise or foolish, does not concern the courts of justice. As between the right of all men, at the present day, to buy and sell, to borrow and lend, to plant and build—and the right of the primitive man to gather fig

leaves for his own covering, we perceive no difference in legal principle—none whatever.

Natural trade is free trade. In all these so-called "eight-hour laws" we can discern no real kindness towards the laboring classes. To our comprehension, all this so-called legislation involves a complete surrender of contractual freedom: Because the right of law makers (if such a right exists) to prescribe a day of eight hours, at the behest of organized labor, is coupled with the right to prescribe a day of fourteen hours, at the behest of organized capital. Nearly thirty years ago, one of the ablest men that ever adorned the French bench asserted (in one of the cases below cited), "The injustice perpetrated under acts of irresponsible legislation has become a crying evil in our country."

General, natural competition is the healthful stimulus of legitimate modern business. These preliminary observations are suggested by a careful reading of the case of *Allgeyer v. State of Louisiana*, 17 Sup. Ct. Rep., 427, quite recently decided by the United States supreme court, in which freedom of contract is most handsomely vindicated. The facts were these: In 1894 Louisiana enacted a statute, "to prevent persons, corporations or firms from dealing with marine insurance companies that have not complied with law." It appears to have been designed to reach and to nullify all dealings with foreign insurance companies, except in cases where the foreign corporation had become regularly domiciled within the state by filing a copy of its charter, designated an agent and a place of business, and, indeed, complying with all the requirements of the local statute. The terms of this act of 1894 were that "any person, firm or corporation who shall fill up, sign or issue in this state any certificate of insurance under an open marine policy, or who, in any manner whatever, does any act in this state to effect for himself or for another, insurance on property then in this state, in any marine insurance company which has not complied, in all respects, with the laws of this state, shall be subject to a fine of one thousand dollars for each offense, which shall be sued for, in any competent court, by the attorney gen-

eral, for the benefit of the charity hospitals in New Orleans and Shreveport." Under this statute the attorney general sued Allgeyer, claiming that the latter had been guilty of three distinct violations of the act, and, of course, claiming judgment for three thousand dollars. It appeared on the trial that Allgeyer was a broker and exporter of cotton, and that he had arranged with the Atlantic Mutual Insurance Company for marine insurance to the extent of \$200,000, the parties adopting the so-called "open policy." This insurance company was a New York corporation; all premiums due to it, and all losses due from it, were made payable in New York city; indeed, all contracts made by and with it were New York contracts. It had never complied with the foreign corporation law of Louisiana, and, as will be obvious from its methods of transacting business, had no occasion to do so. The standing arrangement between Allgeyer and these insurance people was such that, from time to time, whenever he shipped a consignment of cotton, he merely sent them a letter of advice, describing the consignment, specifying the amount of insurance desired, where and to whom payable, etc. October 23, 1894, being about to ship one hundred bales to Paris, he mailed such a letter of advice, notifying these New York parties that insurance to the extent of \$3,400 was desired on this particular consignment. At that time, the property sought to be insured was still in New Orleans; and the mailing of such letter of advice was claimed, by the attorney general, to be a direct and palpable violation of the act of 1894. Allgeyer resisted payment, contending that the act was unconstitutional, for the reason that it "deprived him of his property without due process of law," and also "denied him the equal protection of the law." The trial court decided in his favor, and the prosecution appealed. The supreme court of Louisiana, *State v. Allgeyer*, 48 La. Ann., 104, sustained the validity of this statute, and placed the fine at \$1,000, being for one violation.

Throughout the litigation in the state courts, it was conceded on all hands that the contract of insurance, being valid in New York, where it was consummated, was valid everywhere. Indeed, the only

question was, whether the act of sending this letter of advice, mailed at New Orleans and addressed to the insurance people at New York, was punishable under the act of 1894.

In other words, it was not the "contract" between these parties, but the individual act of Allgeyer, in mailing this letter of advice, that was litigated. Allgeyer removed the case, by writ of error, into the supreme court of the United States; and the latter tribunal, in an opinion written by Justice Peckham and published March 15, 1897, reversed the decision of the state court, and decided the enactment of 1894 to be a violation of the fourteenth amendment to the Federal constitution. This decision is quite significant of itself, and the reasons assigned for it are still more significant. After reciting the facts and quoting very fully from the opinion of the state supreme court, Justice Peckham continued thus: "In the case before us, the contract was made beyond the territory of the state of Louisiana, and the only thing which the facts show was done within the state was the mailing of a letter for notification, as above mentioned, which was done after the principal contract had been made." \* \* \* "In this case, the only act which it was claimed was a violation of the statute in question consisted in sending the letter through the mail notifying the company of the property to be covered by the policy already delivered. We have then a contract which it is conceded was made outside and beyond the limits of the jurisdiction of the state of Louisiana, being made and to be performed within the state of New York, where the premiums were to be paid, and the losses, if any, adjusted. This letter of notification did not constitute a contract made or entered into within the state of Louisiana. It was but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside of the state. It was a mere notification that the contract already in existence would attach to that particular property. In any event, the contract was made in New York, outside of the jurisdiction of Louisiana, even though the policy was not to attach to the particular property until the notification

was sent. It was natural that the state court should have remarked that there is in this statute an apparent interference with the liberty of defendants, in restricting their rights to place insurance on property of their own whenever and in what company they desired. Such interference is not only apparent, but it is real, and we do not think that it is justified for the purpose of upholding what the state says is its policy with regard to foreign insurance companies which had not complied with the laws of the state, for doing business within its limits. In this case, the company did no business within the state, and the contracts were not therein made. The supreme court of Louisiana says that the act of writing within that state, this letter of notification, was an act therein done, to effect an insurance on property, then in the state, in a marine insurance company which had not complied with its laws, and such an act was therefore prohibited by the statute. As so construed, we think the statute is a violation of the fourteenth amendment of the Federal constitution, in that it deprives the defendants of their liberty without due process of law. The statute which prohibits such act does not become due process of law, because it is inconsistent with the provisions of the constitution of the union. The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person (as by incarceration), but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and, for that purpose, to enter into all contracts which may be proper, necessary and essential to his carrying out, to a successful conclusion, the purposes above mentioned." After citing 111 U. S., 746, and 127 U. S., 678, to show certain general definitions which have been given in regard to the meaning of the word "liberty," as that word is used in the fourteenth amendment, Justice Peckham continues thus: "Has not a citizen of a state, under the provisions of the Federal constitution above men-

tioned, a right to contract, outside of the state, for insurance on his property—a right of which state legislation cannot deprive him? We are not alluding to acts done within the state by an insurance company or its agents, doing business therein, which are in violation of the state statutes. Such acts come within the principle of the Hooper case, 155 U. S., 648, and would be controlled by it. When we speak of the liberty to contract for insurance, or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the state, and, as such, was a valid and proper contract. The act done within the limits of the state, under the circumstances of this case and for the purpose therein mentioned, we hold a proper act—one which the defendants were at liberty to perform, and which the state legislature had no right to prevent, at least with reference to the Federal constitution. To deprive the citizen of such a right, as herein described without due process of law, is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which, under the Federal constitution, the defendants had a right to perform. This does not interfere in any way, with the acknowledged right of the state to enact such legislation, in the legitimate exercise of its police or other powers, as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution. In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, must be embraced the right to make all proper contracts in relation thereto; and although it may be conceded that this right to contract in relation to persons or property, or to do business, within the jurisdiction of the state, may be regulated, and sometimes prohibited, when the contracts or business conflict with the policy of the state, as contained in the statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts, of the nature involved in this case, outside of the limits and jurisdiction of the state

and which are also to be performed outside of such jurisdiction: nor can the state legally prohibit its citizens from doing such an act as writing this letter of notification even though the property which is the subject of the insurance may, at the time when such insurance attaches, be within the limits of the state. The mere fact that a citizen may be within the limits of a particular state does not prevent his making a contract outside of its limits while he himself remains within it; *Milliken v. Pratt*, 125 Mass., 374; *Tilson v. Blair*, 21 Wall., 241. The contract in this case was thus made. It was a valid contract, made outside of the state, to be performed outside of the state, although the subject was property temporarily within the state. As the contract was valid in the place where made, and where it was to be performed, that party to the contract upon whom is devolved the right or duty to send the notification, in order that the insurance provided for by the contract may attach to the property specified in the shipment mentioned in the notice, must have the liberty to do that act, and to give that notification, within the limits of the state, any prohibition of the state statute to the contrary notwithstanding. The giving of the notice is a more collateral matter. It is not the contract itself, but is an act performed pursuant to a valid contract, which the state had no right or jurisdiction to prevent its citizen from making outside the limits of the state. The Atlantic Insurance Company of New York has done no business of insurance within the state of Louisiana, and has not subjected itself to any provisions of the statute in question. It had the right to enter into a contract, in New York with citizens of Louisiana for the purpose of insuring the property of its citizens, even if that property were in the state of Louisiana: and correlatively, citizens of Louisiana had the right, without the state, of entering into contracts with an insurance company for the same purpose. Any act of the state legislature which should prevent the entering into such a contract, or the mailing, within the state of Louisiana, of such a notification as is mentioned in this case, is an improper

illegal interference with the conduct

of the citizen, although residing in Louisiana, in his right to contract and to carry out the terms of a contract validly entered into outside and beyond the jurisdiction of the state. In such a case as the facts here present, the policy of the state in forbidding insurance companies, which had not complied with the laws, from doing business within its limits cannot be so carried out as to prevent the citizen from writing such a letter of notification as was written by the plaintiff in error in the state of Louisiana, when it is written pursuant to a valid contract made outside the state, and with reference to a company which is not doing business within its limits. For these reasons, we think the statute in question (No. 66, Laws of Louisiana, 1894), was a violation of the Federal constitution and afforded no justification for the judgment awarded by that court against the plaintiff in error."

The foregoing opinion presents several different features, of practical importance to business men. As we have already intimated, it means contractual freedom, not only for the individual citizen, but also for business corporations.

Its use of the term, "doing business within, etc.," as applied to foreign corporations, is directly in line with what the adjuster has again and again, shown to be the only legitimate and proper use of that phrase.

Its liberal, broad-gauge definition of "liberty," as that term is employed in the fourteenth amendment, is likewise significant. It is a well authenticated yet curious fact, in the history of common law jurisprudence, that the best definition of civil liberty, the definition which has most successfully borne the test of criticism and time, came, not from the bench, nor from the bar, but, from the pulpit. Social reformers have been wont to discourse, eloquently and learnedly, about the priceless blessings of liberty, but without enlightening the world as to the real meaning of that hackneyed term. But in a sermon preached by a high dignitary of the Church of England, in February, 1776, we are told that "civil liberty is freedom from all restraint, except such as established law imposes for the good of the com-

munity, to which the partial good of each individual should at all times give place." That is the kind of liberty in which the adjuster religiously believes, as being the natural birthright of the entire human family. And we are glad to see that definition not only substantially approved, but, indeed, broadened and enlarged, by the highest tribunal known to the American people. Another peculiar feature of Allgeyer's case, and one most significant at the present time, is the quotation from Judge Bradley's opinion in 111 U. S., 746; because that adoption of his language tends to prove that the majority of the federal supreme court, as at present constituted, now holds the same views entertained by a strong minority of that court twenty-five years ago, on certain questions of constitutional law. Those of our readers who have been on the stage of active life until they have become more or less weather-beaten on the outside, cannot have forgotten the so-called "slaughter house cases." And as to readers whose personal recollection does not reach back that far, it may not be altogether amiss to recall that famous litigation. What the Dred Scott case was, on the eve of the great civil war, and what the income tax cases have been in recent years, the slaughter house cases were, during the first administration of President Grant. The material facts were substantially these: March 8, 1869, the legislature of Louisiana passed an act, to take effect June 1, 1869; and that statute gave rise to litigation which, at one time bid fair to become an issue in national politics. It was entitled an act "To protect the health of the City of New Orleans, to locate the stock landing and slaughter houses, and to incorporate the Crescent City Live Stock Landing and Slaughtering Company." In the exercise of its police powers, the state undertook, by this enactment, to protect the public health, by requiring all slaughter houses to be located on the river at points below the city; and it did very much more than that.

The act created a corporation composed of seventeen persons, and it gave to them, for a period of twenty-five years, the exclusive right to land and slaughter animals. They were required

to prepare suitable slaughter houses, at designated points below the city; all other slaughter houses were required to be closed, and it was made a penal offense for any other person to land or slaughter animals; all animals designed for food must be landed and slaughtered at the houses provided for that purpose by this corporation; and for each animal landed or slaughtered, a fee was collectible by the corporation. The act was made to apply to the three parishes of Jefferson, Orleans and St. Bernard, an area of 1,154 square miles, with a population, including New Orleans, of about one quarter of a million. At the time this act was passed, there were at least one thousand butchers engaged in business in and about New Orleans. The direct effect of this legislation was to outlaw the business of these men, and to confiscate their property.

Down to and including May 31, 1869, it was entirely lawful for any and every person to land and slaughter animals for the New Orleans market. From and after June 1, 1869, that business was unlawful for all persons except the new corporation thus favored; no other persons could lawfully slaughter animals, or land, or keep them for slaughter. Such legislation could produce but one result. Between the seventeen men thus enfranchised, and the thousand thus disfranchised by legislative enactment, there ensued a bitterly contested, expensive and protracted litigation—litigation which makes up a most curious and instructive chapter in the history of our constitutional law—litigation which had almost become ancient history, until recalled by the citation of authorities in Allgeyer's case. Soon after the statute became operative, the newly fledged corporation promptly took the initiative, by prosecuting all butchers found engaged in their former calling. On the other hand, many of those who had thus been legislated out of business combined, to test the validity of this enactment, calling themselves the "Butchers' Union." There were nearly three hundred suits pending between these rival organizations, in the spring of 1870, some of which were twice carried to the federal supreme court. The reader who is at all curious in such matters will find the

complete history of that litigation, taking the reported cases in their chronological order, in 1 Abb. U. S. Reps., 388; 22 La. Ann., 545; 83 U. S., 36; 111 U. S., 746; 54 Fed. Rep., 216; 56 Fed. Rep., 416. In June, 1870, Justice Bradley, of the federal supreme court, was assigned to hold a term of the United States circuit court, at New Orleans; and he was at once applied to, by the Butchers' Union, for an injunction to restrain these vexatious suits, then pending against them in the state courts. There being at that time no act of congress to justify such an injunction, he, of course, denied their application; but he denounced the statute, in unmeasured terms, as being in violation of the fourteenth amendment; and, to his lasting honor, he there and then announced the real principle to which the legal profession throughout this country appears to have come at last. He was the first judge to pass upon the question, and the one, of all others, to place that question upon its true ground, though litigation was constantly pending from May, 1870, until June, 1893. His first opinion as it will be found in Abbott's Reports, above cited, stands out, in bold and clear relief, as a landmark in the pathway of American progress. Read now, in the light of events which have since transpired, the following reference then made by him to the fourteenth amendment has an almost prophetic ring: "It is possible that those who framed this article were not themselves aware of the far-reaching character of its terms. They may have had in mind but one particular phase of social and political wrong which they desired to redress. Yet, if the amendment, as framed and expressed, does in fact bear a broader meaning, and does extend its protecting shield over those who were never thought of when it was conceived and put in form, it is to be presumed that the American people, in giving it their imprimatur, understood what they were doing, and meant to decree what has in fact been decreed." Again he said: "There is no more sacred right of citizenship than the right to pursue, unmolested, a lawful employment in a lawful manner." Again he said, with reference to the peculiar character of this statute: "The *ipse dixit*

of the legislature assigns a lawful and ordinary employment to one set of men, and denies and prohibits it to another." Those who denied the validity of this statute were advised that their proper remedy was to allow the question to be decided by the state supreme court, and then remove the case into the federal supreme court, which was accordingly done. In November, 1870, the merits of this statute were passed upon by the supreme court of Louisiana, 22 La. Ann., 545. Three judges, out of a bench of four, agreed in holding the law to be no violation of the constitution, and no infringement upon immunities, liberties and privileges guaranteed by that instrument.

Among the notable things said by that trio, on that occasion, was this: "Liberty is the right to do what the law permits"—a definition which may, or may not, be sound. For example: If by "law," as the term is used in that definition, we are to understand the "municipal law," the law between sovereign and subject, between the state and its citizens, the definition at once resolves itself into an absurdity.

Armenians have the right to do whatever the Turkish law permits; Cubans have the right to do whatever the Spanish law permits; therefore, Armenians and Cubans enjoy the quality of liberty defined by that trio of judges. One judge, Wyly, boldly dissented, saying this: "The citizen has no greater property than the freedom of trade and labor."

The case was then removed into the federal supreme court, on a writ of error granted by Justice Bradley. The latter court proved to be hopelessly divided in opinion; five judges, Clifford, Davis, Hunt, Miller and Strong sustained the law; four judges, Bradley, Chase, Field and Swayne took the same view formerly expressed by Justice Bradley at the circuit, 83 U. S., 36.

The majority held the enactment of this statute to be a legitimate exercise of the police power of the state. The minority held it to be a direct and palpable violation of the fourteenth amendment.

Justice Bradley could not well improve upon what he had said when at

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## OHIO STATE REPORTS.

Volume 54, Ohio State Reports, is now ready for delivery, and may be obtained at \$1.50 per volume, payable in advance.

The supreme court last week on motion of E. H. Hopkins, dean of the college of law of the Western Reserve University of Cleveland, appointed Messrs. L. C. Laylin, of Norwalk; C. D. Hine, of Youngstown; Thomas H. Hogsett, of Cleveland; John J. Sullivan, of Warren, and John E. Betts, of Findlay, to attend the graduating exercises of the college of law and examine the candidates for graduation. L. C. Laylin, is designated as chairman of the committee.

A novel question has been raised in the Franklin common pleas court in the case of burglar Jim Anderson, who is charged with burglary. It appears that when the grand jury investigated the matter it was found that Anderson had served two terms in the Ohio penitentiary, and indicted him as an habitual criminal. Anderson was first convicted in Wayne county on the charge of stealing a number of overcoats out of a fraternity hall. He was next convicted in Franklin county for burglarizing a saloon. After serving a few months of the first sentence Anderson was granted a pardon by Governor Foster. The claim is now made by his attorneys that the pardon bars the record of the first conviction and really Anderson has but one term to his credit. Accordingly a motion was filed to quash the indictment and it was argued before Judge Pugh, last Friday afternoon, by Anderson's attorneys. The motion alleges that the indictment is defective because it charges the commission of a burglary in daytime. It is also alleged that the pardon granted Anderson bars the record made recently and that the count for being an habitual criminal should not stand. Some able arguments were made on this point. Prosecutor Dyer responded for the state. The question whether a pardon by the governor bars the record of the conviction is a new one and the decision of the court on that point will be of considerable interest. Judge Pugh took the matter under advisement.

In volume 4 Ohio Decisions, page 403, in the case of Kirk, Admr., v. Breed et'al, wherein the probate court of Lucas county held that "an attorney retained to secure the debtor's interest in an estate will be allowed fees out of the sum realized by their services before distribution of such among the creditors." Said cause has been appealed to the court of common pleas of Lucas county, and heard before Hon. Isaac Pugsley, who as to said attorney fees completely reversed the decision of the probate court. We shall print the opinion of the common pleas court in full, in a subsequent issue.

The circuit court of the second circuit, has granted a stay of execution in the Albert J. Frantz case. Frantz had been sentenced to be electrocuted at Columbus, May 13. His attorneys applied to the common pleas court at Dayton for a new trial, but Judge Brown, before whom Frantz was tried, overruled the motion. The attorneys went next to the supreme court, but were referred to the circuit court, with their motion and stay of execution. The stay was granted until May 30, when the court convenes at Dayton. It will then be decided whether Frantz gets a new trial or is electrocuted.

#### THE POST CASE.

The circuit court of Cuyahoga county rendered a decision last Monday morning in the contempt case of Louis F. Post. It will be remembered that Judge Lamson, of the Cuyahoga common pleas, caused the arrest of Post, on the charge of contempt of court, for alleged criticism on alleged arbitrary methods used by the judge in the court room. At the time of the arrest Judge Lamson stoutly refused to hear Mr. Post or his attorneys on the merits of the newspaper article in question, stating that when he issued the order for the arrest of Mr. Post, and spread it on the journal, he necessarily pre-judged the article to be contemptuous. The attorneys for Mr. Post asked that the case be heard before a judge "who had not pre-judged the case." This was refused, and Mr. Post was fined \$200 and costs and sentenced to ten days in jail. The case was at once taken to the circuit

court on error and a suspension of execution of sentence was obtained until the decision of the higher court was rendered.

The decision of the circuit court was rendered last Monday morning, which was an exhaustive and an elaborate review of the case. The decision was delivered by Judge Hale. Following is a part of the decision as delivered by Judge Hale:

"When the transaction constituting the alleged contempt did not come within the personal cognizance of the court through his own senses, as in this case, the better practice would seem to be to require an information to be filed by the proper representative of the state, and permit the accused to file an answer to the charges made against him in such information; and that all facts not within the personal knowledge of the court should be established in open court upon the sworn testimony of witnesses, or other competent evidence in the ordinary manner of other judicial investigations.

"This precise point has not been determined, so far as we are aware, by any court in this state; but substantially the uniform practice in the cases reported has been to require an information to be filed. While we are of the opinion that no affidavit was required or necessary, we do hold that the safer and the better practice is to require an information to be filed, specifying the transaction alleged to be contemptuous, unless the court has personal knowledge of such transaction.

"I desire to add that in any event, whether the transaction constituting alleged contempt is brought into the record by information filed or first entered upon the journal of the court by the order of the court before the arrest of the accused or any notice to him, the fullest opportunity should be given him to show cause why he should not be punished for contempt, and his guilt should not be determined before such opportunity is given to him.

"The plaintiff in error prepared and asked leave to file an answer to the charges made against him, but his request was refused.

"All the facts and circumstances en-

tering into and surrounding the transaction were competent to be given in evidence; the answer was clearly proper to be considered by the court, as well as denial of some of the charges made in the journal entry referred to, and in refusing to allow the filing of this answer we think the court erred.

"The court also erred in refusing to allow the testimony to show mitigating circumstances."

Judge Hale concluded as follows:

"Two classes of cases involving the publication of newspaper comment upon proceedings in court have been considered in contempt cases—those tending to effect the decision of a pending case, and those which have for their object the bringing of courts and judges into discredit.

"The article in this case, alleged to be contemptuous, has reference to a transaction wholly past. The article in some respects is unjust and unreasonable. The writer had no just appreciation of the subject upon which he commented.

"The tendency of the article, however, was not in any way to embarrass the court. A considerable part of the article was general in its terms, and was a criticism of all judges and their methods, and a single transaction of one judge was related and commented upon.

"It will not be claimed that the publication of this article had the slightest influence on the judge named therein in the disposition of the case then pending, or in any way embarrassed him in the disposition of any case thereafter to be tried.

"It did not, therefore, in the judgment of this court, obstruct the administration of justice."

#### DECISION IN THE CONSOLIDATED STEEL STRIKE.

A knockout blow to the strikers of the Consolidated Steel Co., was delivered by Judge Sage of the United States circuit court and district court at Cleveland, last Saturday morning. He allowed a temporary injunction against them at the conclusion of a lengthy and exhaustive opinion which he read.

Judge Sage maintained that the proof was conclusive that violence had been

done to the men in the employ of the company; that if the persons named as defendants to the suit were not actually engaged in that violence they were at least closely associated with the mobs and were their ruling spirits. Further, he maintained that the Rodmill Worker's Union was the fountain head of the trouble, for if it did not commit violence it at least kept agents about the property of the company whose duty it was to keep a close surveillance upon all who went in and came out of it, and also upon all that was being done in and about the works. Continuing he said that the men in the employ of the company were waylaid on their way to and from their homes, and if they were not actually assaulted they were unlawfully interfered with in that they were urged and commanded to do that which they did not wish to do and threatened if they did not obey the bidding of their assailants. It was clear, he maintained, that the defendants had materially interfered with the lawful rights of the company and the men in their employ. The judge, with significant emphasis, called attention to the fact that the company had been operating its plant without the slightest molestation since the court allowed a temporary restraining order.

During the reading of the decision the court room was crowded with attorneys, strikers and others. Among those present were recognized many large manufacturers, street railroad magnates, and others directly associated with the employment of labor.

Following is our excerpt of the court's opinion:

"Upon complainant's application, on the 9th of April, a preliminary restraining order was issued to continue in force until the hearing and disposition of complainant's motion for a temporary injunction. For the complainant thirty-eight affidavits were filed and for defendants forty-seven affidavits. The affidavits of the first named fully support the averments of the bill and circumstances of many cases of assault and maltreatment are detailed with the names of the defendants concerned in them. Each individual defendant makes affidavit denying any acts of intimidation or violence attributed to him, and enters upon a gen-

eral denial which is substantially the same in each affidavit.

"Three policemen of the city, Paul Weis, Jeffrey Gibbons and John J. Connell, make affidavits that they were on duty at and near the complainant's works and plant at dates beginning March 24, 1897, and reaching to April 20, 1897, and that they never saw any disorder or disturbance of any kind, that the defendants whom they saw around and near the works were orderly and peaceable, that no acts of violence occurred, no additional force of policemen was required and none was present except on one occasion, when there were five extra policemen there. Why they were present is not explained. There are two Gibbons, and there is one Connell in the list of defendants. Whether they are relatives of the policemen of the same name, who are affiants does not appear. It is enough to say of these affidavits that they are so overwhelmingly contradictory as to be utterly discredited. If the affiants are not foresworn they are, to put the matter in the most charitable light gifted with such facility for appealing from their knowledge to their ignorance as to be altogether unworthy of belief.

"On the other hand more than a score of affidavits by complainants, employees and others, including persons entirely disinterested, recite acts of intimidation and violence by the defendants and others of a mob assembled morning and evening and day after day, at and about the entrance to complainant's mill, preventing employees from going to their work, assaulting, beating, wounding and maltreating them, and as they came out from the mill following them and falling upon them and making unprovoked, brutal and outrageous attacks upon them, so that they went bruised and bloody to their homes, where many of them remained, fearing to attempt to go again to their work.

"The statement in the affidavit of John Kane, grand president of the National Association of Rodmill Workers of America, that friendly and cordial negotiations between the defendants and the complainant's superintendent had reached a settlement, needing only a formal ratification by the defendants' lodges, and that they would have been settled but for the

institution of this suit, is remarkable. Why his company, if it desired settlement as represented, should, just when it had been fully agreed to on both sides and was on the eve of final consummation break it off and resort to proceedings in court which must inevitably put an end to all negotiations is to the court so entirely inexplicable to be simply incredible.

"The averments of this affidavit and that of Patrick Murphy, taken in connection with the fact that in none of the defendants' affidavits, excepting those of the three policemen, is there any denial of the specific averments of the bill, or of the affidavits filed for complainant, that there was continuously a riotous assemblage which \* \* \* threatened, intimidated, abused and maltreated complainants' employees \*

\* \* \* These are tantamount to an admission of the averments of the bill, notwithstanding the denials of the defendants that they participated in the unlawful acts of the rioters. \* \* \* It conclusively appears from the authorities referred to that the English courts, the American state courts and the federal courts are in perfect harmony, and that while they recognize the right of employees of whatever rank or degree to combine for the purpose of resisting any measures of oppression or coercion by their employers, and even for the purpose of instituting strikes and adopting other measures for their own protection or for the bettering of their condition, that they are agreed that they must not interfere with the rights of employers to manage their own business in their own way so long as they do not trespass upon the rights of others.

"Counsel for defendants in this case insisted that his clients had the right as individuals to solicit and persuade employees of the complainant to give up their situations, insisting also that the employees were under no contracts to labor for any specified period. Counsel then advanced the proposition that if the defendants had the right singly to persuade complainant's employees to quit work they had the right to do so in companies or in mass and that they had the right to congregate for that purpose in the public streets. \* \* \*

That complainant's employees were under no term contracts, is, I think, established by the evidence. But the conclusion deduced by counsel, although ingenious, is altogether unsound. That the defendants might, as counsel put it, peaceably and quietly persuade complainant's employees to quit work, is not, and cannot be successfully denied. But persuasion with the hootings of a mob and deeds of violence as auxiliaries is not peaceable persuasion. As to the proposition, the defendants were only exercising their constitutional rights, the court commends to their pursual the recent case of *Garret et al. v. T. H. Garret & Co.*, circuit court of appeals, sixth circuit, 78 Fed. Rep. page 472, decided Dec. 8, 1896. The appellants were manufacturers of snuff, known to the trade as Garrett's snuff, and sued to restrain defendant company from using the name Garrett on packages and cans of snuff manufactured by it and placed on the market and for sale. It was contended for the defendant that every man has the right to the use of his own name in business, and as to the order of injunction below restraining defendant from using white paper for its labels, that every person has a constitutional right to use white paper. The court said: "These propositions, in the abstract, are undeniably true, but counsel for the time overlooked the fact that wherever there is an organic law, wherever a constitution is to be found as the basis of the rights of the people, and as the foundation and limit of the legislation and jurisprudence of the government, there the mutual rights of individuals are held in the highest regard and are most jealously protected. Always, in law, a greater right is closely related to a greater obligation. While it is true that every man has a right to use his own name in his own business, it is also true that he has no right to use it for the purpose of stealing the good will of his neighbor's business, nor to commit a fraud upon his neighbor, nor to trespass upon his neighbor's rights or property; and, while it is true that every man has a right to use white paper, it is also true that he has no right to use it for making counterfeit money nor to commit a forgery. It might as well be set up, in

defense of a highwayman, that because the constitution secures to every man the right to bear arms, he has a constitutional right to rob his victim at the muzzle of a rifle or revolver."

"Counsel for defendants closed his arguments with a somewhat impassioned appeal to the court coupled with the expression of his hope and confidence that the decision would not be calculated to drive his clients to become narchists. So long as labor organizations keep themselves within the limits of the law they will not be interfered with by courts, and they will have the good will and sympathy of a vast majority of well disposed citizens. When they exceed these limits they will be restrained by the courts and dealt with whatever the consequences may be, and they will lose the sympathy and good will of the public. The extraordinary character of the appeal made to the court justifies me in adding that whenever and wherever the spirit of anarchy may manifest itself, whether within or without the lodges, the courts will be ready for the emergency, and the American people, if occasion require, will rise in their majesty and their might and crush it as a trip hammer would crush an egg shell. Upon the facts of this case, and upon the law as stated in the authorities cited, the complainant's motion for a temporary injunction will be granted. A bond of \$2,000 will be required."

#### SUPREME COURT OF OHIO.

##### Official Record of Proceedings.

##### General Docket.

TUESDAY, May 11, 1897.

3662. C. N. O. & T. P. Ry. Co. v. The Citizens' National Bank. Error to the superior court of Cincinnati.

MINSHALL, J.

1. A certificate of stock of a corporation in the usual form is an assurance to the world by it, that the person named is the owner of the number of shares of its capital stock stated therein, and that these shares will be transferred on the books of the company to one purchasing the same, on a surrender of the certificate with a proper assignment; and one who purchases such certificate in the market, without knowledge of any fraud in its issue, is entitled to have it transferred to him on the books of the company; and if on de-

mand such transfer is refused, may recover of the company its value at the time of the demand.

2. Where certificates of the stock of a company are required to be issued by the president and the secretary under the seal of the company, and no other mode is provided or can be used, and neither the secretary nor the president is prohibited from holding stock, and both with its knowledge do in fact hold stock, the fact that a certificate is issued in favor of the secretary is not, of itself, sufficient to put a party on inquiry as to whether the secretary is rightfully the owner of it.

3. By reason of what appears on the face of a certificate of stock, and the fact that, as a matter of general knowledge in the business world, such certificates of stock are extensively purchased as investments, with no other inquiry than as to the genuineness of the signatures of the officers to the certificates, and that such use of them adds to the value of the stock of a company and is largely to its advantage, the company is charged with the duty of observing care in their issue, and of supervising their agents charged with the performance of the duty. This is a duty it owes to all persons dealing in its stock; and if, by reason of its negligence in this regard, spurious stock is issued, it is liable in damages to any one, purchasing it for value, without knowledge of its fraudulent character. And a failure of the party, under such circumstances, to inquire at the office of the company, is not such contributory negligence, as will deprive him of the right to recover, although such inquiry would have disclosed the fraudulent character of the certificate.

Judgment affirmed.

SHAUCK, J. dissents.

SPEAR, J., not sitting.

4209. The Missionary Society of the Methodist Episcopal Church v. Heman Ely et al. Error to the circuit court of Lorain county.

SPEAR, J.

1. An application to the probate court to admit an alleged will to probate is a special proceeding within the meaning of that clause of section 6707, which provides that an order affecting a substantial right made in a special proceeding is a final order which may be vacated, modified or reversed as provided in Title IV, of the Revised Statutes.

2. Where, upon appeal to the court of common pleas from an order refusing to admit such will to probate, that court makes a like order of refusal, the proponent cannot again propound the alleged will for probate.

3. There is authority in the court of common pleas in such case to allow and sign a bill of exceptions setting out all the evidence.

4. The order of the common pleas refusing to admit to probate is a final order affecting a substantial right, from which error may be prosecuted to the circuit court, and that court has, by virtue of section 6709, Revised Statutes, jurisdiction to reverse, vacate or modify such order for error appearing on the record.

5. An assignment of error which alleges that the court erred in finding and deciding that the paper writing was not made and executed, attested and acknowledged in accordance with the law of Ohio, raises a question of law, which, if well taken, shows error appearing on the record, and authorizes a reversal of the judgment.

6. It is error for the circuit court in such case, to sustain a motion to dismiss the petition in error on the ground that the court was without jurisdiction to hear the same.

Judgment reversed, and cause remanded for further proceedings.

MINSHALL, J., dissents.

4216. Katherine Keyl et al. v. Henry Feuchter et al. Error to the circuit court of Summit county.

BY THE COURT.

One essential to the admission of a paper writing purporting to be a will to probate is that it shall have been acknowledged by the maker as his will, and his signature also acknowledged, in the presence of the two subscribing witnesses.

Judgment affirmed.

4359. Sarah Jacks et al. v. Mary A. Adamson. Error to the circuit court of Lawrence county.

SHAUCK, J.

The power of a court of record to enter *nunc pro tunc* the evidence of judicial action previously taken should be exercised only upon evidence which shows clearly and convincingly that such former action was in fact taken; but this rule as to the effect of the evidence does not change the general rules as to its competency; and the oral testimony of witnesses having personal knowledge of that fact is admissible. (Heirs of Ludlow v. Johnson, 3 Ohio, 553, distinguished.)

Judgment of the circuit court reversed and that of the common pleas affirmed.

4479. Roeliff Brinkerhoff, Trustee v. Hiram R. Smith et al. Error to the circuit court of Richland county.

BRADBRURY, J.

Where, in an action brought under section 6343, Revised Statutes, the petition sets forth facts showing that a conveyance made in contemplation of insolvency by a debtor to secure certain favored creditors, should be declared a general assignment for the benefit of all the creditors of the party executing it, a defendant, in his answer and cross-petition may adopt such averments without repeating them, and if he does adopt them, they should be deemed a part of his answer and cross-petition, entitling him to the same relief as if he had restated them. After such answer and cross-petition has been filed the plaintiff cannot dismiss the action as to such defendant without the consent of the latter, who, notwithstanding such attempted dismissal, may proceed in the action in all respects as if he was the plaintiff therein.

2. The right arising under section 6343, Revised Statutes, inures to the equal benefit of all the creditors of the insolvent maker of the conveyance; and a right of action to enforce the trust created by this section accrues to each creditor, contemporaneously with the execution and delivery of the instrument upon which the trust arises, whether his claim has been reduced to judgment or not.

3. An action to enforce the trust is a civil action, equitable in its nature, and governed by the provisions of the code of civil procedure. It can be prosecuted only, by one who is a creditor of the insolvent assignor. The action being properly cognizable in equity, the court in which it is pending, possesses in regard to it, the general jurisdiction that appertains to courts of equity, and may hear and determine every issue of law or fact joined between the parties, whether such issues relate to the character of the conveyance, or to the question whether the plaintiff or one or more of the defendants is a creditor of the assignor, and its determinations, as in other cases, are conclusive.

Judgment affirmed.

4554. Mark Richardson v. Robert H. Jenks et al. Error to the circuit court of Cuyahoga county.

#### BY THE COURT.

To a petition in error seeking a review of an order of the court of common pleas overruling a motion to discharge an attachment, it is a sufficient answer that the cause in which the attachment was issued has been removed to a federal court.

Demurrer to answer overruled and petition in error dismissed.

4592. George F. Arnold v. Frank P. Yanders. Error to the circuit court of Cuyahoga county.

BURKET, C. J.

The act of May 19, 1894, 91 O. L., 346, entitled: "An act to regulate the sale of convict made goods, wares and merchandise manufactured by convicts in other states," is in conflict with section eight of article one of the constitution of the United States, and is therefore void.

Judgment affirmed.

5377. The State of Ohio on Application of Charles E. Iliff v. Frederick Bader et al., Commissioners of Hamilton county. Error to the circuit court of Hamilton county. Judgment of the circuit court and of the common pleas court reversed on authority of Hixson v. Burson, 54 Ohio St., 470 and State ex rel. v. Commissioners, 54 Ohio St., 333. Demurrer to petition overruled and cause remanded to the court of common pleas for further proceedings.

MINSHALL, J. The ground on which I think the act is unconstitutional is, that it compels a county, through its commissioners, to raise funds by the taxation of the property of the county, to pay for the condemnation of property required for the improvement of a street of a city of the first grade of the first class within it. This violates the fundamental principle of

taxation. It is a taking of the property of one locality without the voice of its people for the benefit of another. If sound in principle the people of one county without their consent, may be taxed for the construction of roads in another county. For it will be found on reference to the second clause of the first section of the act, that its provisions are mandatory so far as it relates to the action of the county commissioners; for the commissioners are required to raise by taxation the funds provided for in the first clause of the first section, whenever the city takes the necessary steps for improving "such streets" in the manner provided in title 12 of the Revised Statutes for improving other streets in the corporation. The initiative is in the city, and the duty becomes obligatory upon the county commissioners of providing funds to pay for condemnation of property required in making the improvement, whenever the city takes the initiative.

5417. The State of Ohio v. John W. Myers. Exceptions by the prosecuting attorney to the decision of the court of common pleas of Stark county.

WILLIAMS, J.

1. A statute defining a crime or offense cannot be extended, by construction, to persons or things not within its descriptive terms, though they appear to be within the reason and spirit of the statute.

2. Section 6841, of the Revised Statutes, applies only to persons who are charged by law with the performance of the duties therein mentioned; and a deputy county treasurer is not within its provisions, nor subject to indictment thereunder.

Exceptions overruled.

4553. John G. Hower et al. v. J. E. Williams. Error to the circuit court of Cuyahoga county. Judgment affirmed.

4584. The Lake Shore & Michigan Southern Ry. Co. v. James M. Wentworth. Error to the circuit court of Erie county. Judgment of the circuit court reversed and that of the common pleas affirmed.

4602. H. B. Loveman, Trustee, v. Anton Beznoska et al. Error to the circuit court of Cuyahoga county. Judgment affirmed.

4615. Abrami D. Detwiler et al. v. Edith E. Gates et al. Error to the circuit court of Lucas county. Judgment affirmed.

4621. James B. Gornley, Assignee, etc., v. J. E. Cunningham et al. Error to the circuit court of Seneca county. Judgment affirmed.

4626. Jason Blackford v. Thomas W. Beery et al. Error to the circuit court of Hancock county. Judgment affirmed.

4642. Laura A. Partridge v. William Geach, Guard. Error to the circuit court of Licking county. Judgment affirmed.

4645. Daniel B. Stewart v. John P. Coe. Error to the circuit court of Athens county. Judgment affirmed.

5215. I. J. Miller and Gustav Tafel, Trustees, v. El. W. Kitridge. Error to the circuit court of Hamilton county. Judgment affirmed.

5242. *The State of Ohio v. John Rose*. Error to the circuit court of Jefferson county. Judgment affirmed.

5381. *The Cincinnati, Hamilton & Dayton Ry. Co. v. Ada Crumley, Admx.* Error to the circuit court of Hamilton county. Judgment affirmed.

The following causes on the General Docket have been dismissed for want of preparation.

5356. *John C. Bolon v. Cephas W. Starr*. Error to the circuit court of Belmont county. Dismissed for failure to file printed record.

5368. *James Andrews et al., Exrs., v. Robert C. Finley et al.* Error to the circuit court of Montgomery county.

4670. *John Herig et al. v. Joseph Daniels*. Error to the circuit court of Cuyahoga county.

4691. *Samuel C. Craven et al. v. Hiram Craven et al.* Error to the circuit court of Wayne county.

4697. *M. F. Newman et al. v. Jane Johnson, Admx., et al.* Error to the circuit court of Adams county.

4705. *Sibella Fink v. Ezra V. Dean*. Error to the circuit court of Lawrence county.

4708. *Eliza Jane Smith v. Christian Speck et al.* Error to the circuit court of Stark county.

4724. *Ada J. Bowman et al. v. Ida L. Phillips*. Error to the circuit court of Licking county.

4766. *Chris Holl et al. v. The State of Ohio*. Error to the circuit court of Hocking county.

4771. *Leo A. Brigel v. Edmund W. Kittredge et al.* Error to the superior court of Cincinnati.

4472. *Leo A. Brigel et al. v. Edmund W. Kittredge et al.* Error to the superior court of Cincinnati.

#### Motion Docket.

2923. *The City of Cincinnati v. The Cincinnati Inclined Plane Ry. Co. et al.* Motion by plaintiff for leave to file a petition in error to the superior court of Cincinnati. Motion

overruled for the reason that the cause is pending in the superior court of general term.

2924. *The Cincinnati Street Ry. Co. v. The Cincinnati Inclined Plane Ry. Co.* Motion for leave to file a petition in error to the superior court of Cincinnati. Motion allowed.

2926. *Emma F. Alexander et al. v. Martin Groeschen et al.* Motion by defendant to advance cause No. 5005, on the General Docket. Motion overruled.

2927. *Mark Richardson v. Robert H. Jenks et al.* Motion by defendant for leave to file answer in cause No. 4554, on the General Docket. Motion Allowed.

2928. *James S. Rickets et al. v. A. T. McArthur et al.* Motion by plaintiff for supersedeas in cause No. 5554, on the General Docket. Motion allowed and execution of judgment stayed, bond fixed at \$15,000 with sureties to acceptance of clerk of courts of Perry county.

#### New Cases.

New cases filed in the supreme court since May 5, 1897.

5559. *The Incorporated Village of Salineville v. Mary S. Zealey*. Error to the circuit court of Columbiana county. P. M. Ashford and Potts & Moore, for plaintiff. W. H. Spence and B. Morrison, for defendant.

5560. *Sarah S. Carter et al. v. The City of Zanesville*. Error to the circuit court of Muskingum county. King & Browning, for plaintiff. Durban & McDermott, for defendant.

5561. *The City of Cincinnati v. The Cincinnati Inclined Plane Ry. Co.* Error to the superior court of Cincinnati. Frederick Herstein, for plaintiff. Miller Outcalt and C. B. Matthews, for defendant.

5562. *Cornelia Z. Crum et al. v. Jacob Zettler Jr.* Error to the circuit court of Franklin county. J. J. Stoddard and G. S. Peters, for plaintiff. Thos. E. Steele, for defendant.

5563. *Margaret McAllister v. Edward A. Hartzell*. Error to the circuit court of Trumbull county. Tuttle & Fillius, for plaintiff. L. F. Hunter, for defendant.

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## OHIO STATE REPORTS.

Volume 54, Ohio State Reports, is now ready for delivery, and may be obtained at \$1.50 per volume, payable in advance.

The supreme court, Tuesday, pronounced a special act constitutional which was passed by our last legislature, extending the term of the mayor of Cincinnati to July 1, 1897.

The supreme court will be asked to construe the joint resolutions providing for a vote this fall on the question of holding a constitutional convention, the purpose being to ascertain the constitutional method of voting on the proposition.

The committee appointed by Judge Wright of the Hamilton common pleas court, consisting of ex-Judge Worthington, ex-Atty. Gen. Harmon, and Francis Oldham, to whom was referred the recent conduct of Charles L. Lundy, a member of the Hamilton county bar, filed a charge of unprofessional conduct involving moral turpitude. The charge is supported by two specifications, to-wit:

1. That in October, 1894, Lundy, while acting as counsel for the plaintiff in the Arnold divorce suit, submitted said cause to Hon. Charles Evans, one of the Judges of the common pleas court, for final judgment, whereupon Judge Evans, upon consideration, found the evidence insufficient and dismissed the petition. Yet the said Lundy well knowing the premises and deceitfully intending to conceal from the court the fact that the said cause had been tried upon its merits and the petition dismissed did, on the fourth day of the present month, wrongfully and deceitfully submit the said cause to Judge Wright and produced evidence on behalf of the plaintiff, Arnold, thereby intending to deceive and mislead the court and obtain a divorce for the said Arnold, although the petition, as Lundy well knew, had therefore been dismissed.

2. That at the time Judge Evans dismissed the petition of the said Arnold, for the purpose of evidencing the said judgment of dismissal and directing the

clerk of the court to enter the judgment upon the records, he then and there wrote in accordance with the usual custom and practice of the court, upon the wrapper of the original pleadings and papers of the case, the word and letter, "Dismissed," "E." Yet the said Lundy well knowing the premises, and fraudulently intending to destroy the evidence of said judgment, and to conceal the fact from the court that said judgment of dismissal had been rendered, did on or about 4th of May, 1897, fraudulently and deceitfully erase the said word, "Dismissed," and the said initial letter "E," from said wrapper, and return the same to the files of the said court with the said word and letter expunged so as to be almost if not altogether illegible.

"The charges have been set for hearing by Judge Wright on next Friday morning."—*Court Index*.

#### IN MEMORIAM—HUGO A. TAFEL

"There has been much sympathy with Colonel Gustav Tafel in the recent death of his son, Hugo A. Tafel, who was admitted to the bar immediately upon coming of age, and upon whom the honored father had hoped to depend as his own practice grew irksome with advancing years. The resident members of the class to which the deceased belonged (Cincinnati Law School, class of 1893), at a meeting held on Thursday, May 13, adopted the following memorial:

"'Death loves a shining mark,' and this expression was never more fully verified than in the demise of our late classmate and esteemed friend.

"He was born in the city of Cincinnati June 6, 1872; was educated in the public schools, graduating from Woodward high school. He entered the Law school in 1891, from which he graduated with credit to himself and honor to his alma mater in 1893. Immediately after he entered the law office of Tafel & Schott with as bright prospects as ever fell to the portion of any young man.

"Truly, 'man proposes, but God disposes.' After a few short months he was obliged to seek a milder climate on account of his failing health. Various localities were visited in the hope of procuring complete restoration to health

and at last he decided to locate at Riverside, Southern California. For a while the seductive climate fanned hope into faith, only to be blasted, for on April 30, 1897, the noble spirit passed to its eternal rest.

"*Resolved*, That in the death of Hugo A. Tafel the class has lost an honored member, and this community a citizen of sterling worth; be it further—

"*Resolved*, That we extend to the family of our deceased friend our sincere sympathy and condolence in the great loss which has come upon them, and that a copy of this tribute to his memory be sent to the bereaved family and be published in the daily press.

"Milo G. Dodds, H. J. Heilker, Frank Finney, Max Winkler, W. R. Wood, committee."—*Court Index*.

#### NOVATION—LIABILITY OF SURETY.

It has recently been decided in the case of *Frederick Town Savings Institution v. Michael*, in the court of appeals of Maryland, 33 L. R. A. 628—not without a dissenting opinion, however—that the liability of a surety on a note which is secured by mortgage is not affected by the fact that the mortgage was declared void as an illegal preference, under the insolvency law, and that the taking of a new note, which was secured by the mortgage in lieu of other notes with indorsements, and which were surrendered, discharged the liabilities of the sureties on the latter, though the mortgage is set aside as an illegal preference under the insolvency law. At least, this is the case if the holder knew of the maker's insolvency when the transaction was made, and that the consideration moving to a married woman is not necessary, under the married woman's act, to bind her as surety on the note of her husband. The note in suit was an ordinary note signed by William Wilcoxson, Andrew J. Wilcoxson and John L. Michael, as surety. The question arose upon the plea of Michael, that the note had been paid and satisfied by William Wilcoxson, and the material question, and the only one in the case, was: Did Wilcoxson satisfy and discharge the note in question in such a manner as to discharge Michael as surety? Briefly, the record shows

that the appellant was a bank, and the holder of four notes executed by Wilcoxson and sureties, aggregating the sum of \$11,300. The note in suit was one of four. The bank repeatedly pressed Wilcoxson for additional security. He and his wife executed their note for the amount, secured by a mortgage on the real estate. The mortgage and note was accepted without any qualifications, and the new note discounted by it. From the proceeds of the new note Wilcoxson's indebtedness, evidenced by the four notes, was paid, and they were delivered to him. Within a few months after the execution of the mortgage Wilcoxson made application for the benefit of the insolvency law of the State of Maryland, and he was accordingly judged insolvent. The trustees filed a bill in equity to set aside the mortgage, as mentioned, as giving to the appellant a fraudulent preference, under the provision of the insolvent law. Wilcoxson being a merchant, and was insolvent at the time of the execution of the mortgage, the court, in its findings, decreed the mortgage an unlawful preference, and struck it out. The appellant, as mentioned, was pressing Wilcoxson for additional surety, and as soon as the note and mortgage were delivered to the bank they voluntarily surrendered to him the four notes held by it. It is asked by Roberts, J., who delivers the opinion, if it is not a reasonable inference that the appellant was well satisfied with the character of the new security which it had taken in payment of the original indebtedness of Wilcoxson on said four notes as to cause it, of its own motion, to part with the possession of the notes to Wilcoxson, so that the mortgage and note was in no sense additional security. The court also holds that appellant cannot claim, under the circumstances, to have been without notice of the financial status of Wilcoxson, and his liability to be declared on as an insolvent within the four months of the execution of the mortgage. The doctrine is settled that insolvency may be inferred from the surrounding transaction. If, with the knowledge of these facts, as the court infers the appellant had, it then delivered up the four original notes to Wilcoxson, it took an adventure, the consequence of which it

must accept. The court is not of the opinion that, in striking down the mortgage as a fraudulent preference, the notes secured thereby must also abide the same result, neither from principle or authority has the conclusion been reached. *Allers v. Forbes*, Md. 376, 43 Am. Rep., 557. The contention that the note, as to the wife is void because of no consideration to bind her, a different view is, held in *Major v. Holmes*, 124 Mass., 108. The court affirmed the judgment. McSherry, in his dissenting opinion, who is concurred in by Briscoe and Bryan, J.J., after reciting the facts, which are about the same as herein mentioned, says, was there a payment of the note by Wilcoxson under the circumstances stated and by the method? There was no dispute as to the signatures of the note; no pretense was made that the payment was with money, and if there is any payment at all, it could only have been by novation, and if by the latter, was the obligation a new debt substituted for and taken in lieu of and discharging the original indebtedness, and was the note of Wilcoxson and wife, with a collateral mortgage as a mere separable and devisable incident, or was it the note of Wilcoxson and wife of even date securing it, both forming and intended to form one entire consideration? Nothing in the record shows that an agreement to substitute a new note of the debtor and wife as a payment of the four promissory notes, and it cannot be assumed. The burden of proving such a fact rests upon the defendant. The presumption of the law is that the note was taken as a conditional payment only, *Haines v. Pierce*, 41 Md., 221. There being no pretense of payment by money, there was no payment, because on both the note and mortgage were intended by the parties to constitute a payment and a part of the medium payment, the mortgage has failed to be available by reason of infirmities, that the bank did not get the security it intended and contracted to get, and it cannot be treated as holding toward the surety the relation it would have been forced to assume had it secured what it contracted for, and what Wilcoxson undertook to give, and, further, there is no pretense that the bank was to rely solely on the note of Wilcox-

son and wife, as in itself payment of the antecedent debt. The law of Maryland is well settled that the receipt of a security of equal or inferior degrees, to that evidence in the original debt will not operate as a payment of the latter. There must be proof that the new note was accepted by the creditor under an agreement that he would run the risk of its being paid, and would look exclusively to it for satisfaction. *Maryland & N. Y. Coal & I. Co. v. Wingert*, 8 Gill., 171; *Hoops v. Strasberger*, 37 Md. 390, 11 Am. Rep., 538. The burden of proving such agreements is upon the party asserting it. There is no proof in the record that the bank took said note and mortgage under any such agreement, hence there is lacking one of the essential requisites to show a payment by the note. Even though the note was separated from the mortgage, continues to have validity, would not be treated as payment, for the reason that it was agreed to be so considered or treated, and, apart from this, when the mortgage fell the note fell with it. The note of Wilcoxson and wife, as also the mortgage security, was never intended to stand alone. The very condition upon which the delivery of the note depended failed—that is, the mortgage to secure it was inoperative. The condition failing the note was no longer enforceable, and, not being enforceable, it was without value in the hands of the bank, and inoperative as a payment at all.—*American Lawyer*.

## SUPREME COURT OF OHIO.

### Official Record of Proceedings.

#### General Docket.

TUESDAY, May 18, 1897.

4551. Robert Garratt, Surviving Partner, v. D. A. Hollingsworth. Error to the circuit court of Harrison county. Judgment affirmed.

4571. The News Printing Co. v. Isabell Simms. Error to the circuit court of Richland county. Judgment affirmed.

4597. Don De W. et al. v. Robert Henderson. Error to the circuit court of Franklin county. Judgment affirmed.

4603. William A. Neil v. John J. Eichenlaub et al. Error to the circuit court of Franklin county. Judgment affirmed. Minshall, J., dissents.

4611. Levi Mills, Trustee, v. M. A. Kelley et al. Error to the circuit court of Clinton county. Judgment of the circuit court reversed and that of the common pleas affirmed.

4614. Pennsylvania Company v. Susan Hurlless. Error to the circuit court of Van Wert county. Judgment affirmed. Burket, C. J. and Shauck and Spear, JJ., dissent.

4623. James McLandsborough, Admr., v. Jane W. Lyle et al. Error to the circuit court of Harrison county. Judgment affirmed.

5536. Hannah Powell v. The State of Ohio. Error to the circuit court of Franklin county. Judgment affirmed.

5546. The State of Ohio ex rel. Gustav Tafel v. John A. Caldwell. Error to the circuit court of Hamilton county. Judgment affirmed.

#### Motion Docket.

2912. The State of Ohio ex rel. Wm. G. Ward as Sheriff v. James C. Russell as Probate Judge. Motion by plaintiff to advance cause No. 5414, on the General Docket. Motion allowed, cause advanced on briefs to be filed within rule.

2925. E. E. Calderwood, Assignee, v. L. S. Van Lue. Motion by defendant to strike from the files printed record and voucher No. 11 in cause No. 5438, on the General Docket. Motion as to striking from the files the printed record overruled, and as to expunging voucher No. 11 from the printed record sustained.

2929. John Shick et al. v. Chester Bedell. Motion by defendant to dismiss cause No. 5282, on the General Docket. Motion sustained and cause dismissed.

2930. Joseph B. Harris v. The State of Ohio. Motion for leave to file a petition in error to the common pleas court of Franklin county. Motion allowed and cause advanced, briefs to be filed within rule.

2931. George Johnson v. State of Ohio. Motion for leave to file a petition in error to the circuit court of Coshocton county. Motion allowed, cause advanced and briefs to be filed within rule.

2932. The City of Cincinnati v. The Cincinnati Inclined Plane Ry. Co. Motion by plaintiff to advance cause No. 5561, on the General Docket. Motion allowed, briefs of defendant in error to be filed by June 5 and cause to be heard on oral argument June 9.

2933. The Salem Wire Nail Co. v. William I. Egts, by, etc. Motion by defendant to advance cause No. 5413, on the General Docket. Motion allowed, cause advanced and briefs to be filed within rule.

2934. The Cincinnati Street Ry. Co. v. The Cincinnati Inclined Plane Ry. Co. et al. Motion by defendant for leave to file a cross petition in error in cause No. 5565, on the General Docket. Motion allowed, cause to be heard with No. 5561 on June 9. Oral argument noted.

# Ohio Legal News.

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## OHIO STATE REPORTS.

Volume 54, **Ohio State Reports**, is now ready for delivery, and may be obtained at \$1.50 per volume, payable in advance.

The supreme court adjourned last Friday for the Memorial day recess and will not sit again until June 1.

The Cleveland bar association is making elaborate preparations for the August meeting of the American Bar Association in that city.

Judge Pugh, of the Franklin common pleas court, rendered an important decision last Monday, relative to the Ohio habitual criminal law. In the case of Jim Anderson, the notorious burglar, who has served two terms in prison and was recently tried for a third offense, Judge Pugh held that the pardon of Anderson by Governor Bushnell wiped out one of the convictions upon which the habitual criminal prosecution was based. Anderson will therefore escape a life sentence.

In 1894, Judge Moore, of the superior court of Cincinnati, rendered a judgment in favor of Caroline L. Blymyer for about \$8,500 against A. B. Meader, trustee, on a claim she had filed against the Blymyer Ice Machine Co., which claim the trustee had disallowed. A proceeding in error was taken by Meader to the general term of the superior court, which was recently dismissed by that court, following the case of *McAlpin v. Clark*, 2 Decisions, 160, on the ground that a proceeding in error, to reverse a judgment rendered after the act of 1893, transferring error to the superior court at special term to the circuit court, was a new proceeding, and hence not covered by section 79, saving changes in remedy to pending cases from which it followed that the circuit court was the court in which to file the petition in error.

A suit of far reaching importance to bankers throughout Ohio and other states as well, was decided by a jury trial in the Butler common pleas court, before Judge Neilan. It was the case of the

First National Bank of Defiance, O., v. The Middletown (Ohio) Pump Co., wherein the bank brought suit to collect on \$10,000 worth of drafts signed by Gus Latterner, as secretary of the Middletown Pump Co. It appears that the drafts were purely accommodation paper, and when called upon to pay them the company refused. The point of authority of Mr. Latterner, as secretary of the company, to sign its drafts was also raised. After a deliberation of twelve hours the jury returned a verdict of \$4,598 for plaintiff. Had the defendants won the case no bank would feel secure in handling paper indorsed by a single officer of any corporation.

In the United States supreme court last Monday, Justice Peckham handed down the opinion of the court in the case of L. E. Parsons, late district attorney for the northern district of Alabama, appealed from the court of claims. The decision was adverse to Parsons' claim that he was entitled under section 769 of the revised statutes to hold his office for four years, notwithstanding the president's order of removal. Justice Peckham said that while the appointment was for four years, it might be terminated earlier at the discretion of the president. The judgment of the court of claims was affirmed.

It appears that Parsons was removed from the office of United States district attorney in Alabama, in 1893, having been appointed in 1890. He wrote a letter to the president, refusing to surrender the place, on the ground that as he had been appointed for a term of four years the president had no right to remove him before the expiration of that time. He has fought the case through the various federal courts on this theory, losing in the lower courts whose judgments were affirmed by the United States supreme court, last Monday.

In the case of *Fletcher v. The State*, recently decided by the circuit court of Hamilton county, the question of whether or not in the trial of a case in the police court of Cincinnati, the accused was entitled to a trial by a jury, presented itself. The charge upon which the defendants

were tried was a violation of section 6933, having reference to the permitting of games of chance on premises controlled by them. The penalty for violation of this statute is a fine only. In an opinion filed by Judge Smith of the Hamilton circuit court, March 27, it was held that denial of trial by jury in the police court of Cincinnati in such a case is not in contravention of the constitutional right, of trial by jury. This holding is based on the case of *Inwood v. The State*, 42 O. S., 186, where it was held that "A statute which authorizes a penalty by fine only, upon a summary conviction under a police regulation, or of an immoral practice prohibited by law, although imprisonment, as a means of enforcing the payment of the fine is authorized, is not in conflict with either section 5 or 10 of article I. of the constitution, on the ground that no provision is made for a trial by jury in such cases."

We have the opinion of Judge Smith in full, which we shall publish in the NEWS.

A decision which will have much bearing on testimony in criminal cases was rendered by Judge Dellenbaugh of the Cuyahoga common pleas court, last week, Friday. The judge practically said that an action for slander or libel cannot be maintained against a witness who tells certain things in a criminal case in answer to inquiries on the part of the prosecutors or attorneys. If the person on the stand does not tell the truth, there can be an action for perjury, but not for slander or libel. On this decision the judge decided the case of Charles Eberman against Patrolman Martin Bruder, out of court, on a demurrer filed by the city. Eberman sued Bruder because the patrolman said on the stand that he believed Eberman was a known thief and was the keeper of a "fence." Eberman declared the accusation to be false and asked \$5,000 damages.

Judge Dellenbaugh said in part as follows: "The petition does not show that the answers complained of were not relative to the issue then on trial, or that they were not honestly believed to be true. The court must presume in the

absence of an averment to the contrary, that the answers of the defendant were within the scope of the inquiry, pertinent to the issue then on trial in the police court, and that they were honestly believed by the defendant to be substantially true. It is a well settled rule of law, founded upon public policy, that a witness in giving evidence, written or oral, in a court having jurisdiction of the subject-matter, shall do so with his mind uninfluenced by the fear of an action for slander or a prosecution for libel. This rule of law must be applied in this case at bar. The demurrer by the city to the petition is sustained."

#### WATER RENTS AS LIENS.

Director of Law Owen, of Columbus, has rendered an opinion upon the question as to whether or not water rents were a lien upon property. The inquiry was concerning the rights of the city in a case where mortgaged property was by the city supplied with water pending a foreclosure proceeding, and before its sale to a subsequent purchaser under such proceedings, where the water has been turned off prior to such sale, leaving a water charge unpaid. To this inquiry the director of law held as follows:

"*First*—The delinquent water charge does not follow the property as a lien upon it.

"*Second*—The purchaser has a right upon formal application and the performance of offer to perform all prescribed conditions, to have water supplied to his property without being required, as a condition of such supply, to pay delinquent water charges of the prior owner.

"*Third*—Such a delinquent water charge constitutes a personal obligation against the latter."

#### DEATH OF JUDGE TRIPP.

Judge James M. Tripp, of Jackson, Ohio, died at his home last Sunday, after an illness of but one week. Though but 40 years of age, Judge Tripp was regarded by the profession as one of the most learned jurists in the state. At the age of 33 he was elected common pleas judge and his decisions rendered

while on the bench are cited as weighty precedents.

Judge Tripp was recognized as one of the Republican leaders of southern Ohio and as a party organizer of great ability. At the time of his death he was a member of the board of trustees of the Ohio University, having been appointed in 1893 by Governor McKinley. He was also a graduate of this institution.

He was the son of Judge James Tripp, whom he succeeded on the common pleas bench. Judge Tripp resigned during his second term on the bench to make the race for congress in the Tenth district to succeed Hon. A. C. Thompson, of Portsmouth, but in this he was unsuccessful.

He was well liked by all and leaves a host of friends. A wife and one son survive him.

#### OUR SUPREME COURT.

The bar of Ohio, as well as suitors who have cases in the supreme court, will be gratified to learn of the progress which this tribunal has been able to make in dispatching business, during the past year. This court keeps two dockets, one for cases submitted upon briefs, and the other for cases to be heard upon oral arguments. Heretofore, cases on the former docket have not had to wait so long for a hearing, as those on the latter. Last October, when the court convened, the causes on the oral docket were three years and nine months behind those for hearing upon briefs. But much of this difference has now vanished. Cases to No. 4665, assigned for oral argument have been disposed of, and this brings the two dockets up, practically to the same date, a condition of things not heretofore existing for many years. Not only this, but the court has been gaining on the period of delinquency. Cases filed prior to August 5, 1895, have now been disposed of, and the judges lack but one year and ten months of being up with their work. This progress is highly commendable. It has demonstrated the wisdom of separating the court into two divisions. But the gain is not entirely the fruit of this change. Much of what has been accomplished is due to the hard and persistent work of the judges. Prob-

ably more than double the number of cases have been decided and reported this year, than ever were before, in a like period. With as good a record for another year, the dockets will be so little behind that the hearing of cases will be reasonably near the time of filing them.

#### CHARLES L. LUNDY DISBARRED.

Charles L. Lundy, a member of the Hamilton county bar, was tried before Judge Wright, of the common pleas bench, on a charge of unprofessional conduct involving moral turpitude, recently preferred by the committee consisting of ex-Attorney-General Harmon, ex-Judge Worthington and Francis F. Oldham. The charge was trying an uncontested divorce case before Judge Wright which had been tried and dismissed by Judge Evans, thereby deceitfully intending to conceal from Judge Wright that the cause had been previously tried on its merits and dismissed, and also that the said Lundy, well knowing the premises and fraudulently intending to destroy the evidence of the previous judgment and to conceal from the court that a judgment of dismissal had been rendered, erased from the wrapper containing the papers the word "dismissed" and the initial "E" placed there by Judge Evans.

Lundy admitted the erasure, but denied having set the case for trial before Judge Wright, claiming that it remained on the docket from the previous term, but the notice of the setting of the case in his own handwriting was produced. The policy of the defense was to treat what was done as foolish and unwarranted action on Lundy's part, but not action which had worked any harm or involved moral turpitude.

At the conclusion of the argument Judge Wright announced a judgment of disharment. In doing so the Judge spoke of the close and confidential relations existing between the court and members of the bar, and the entire disregard by Lundy of the obligations thus imposed.

Notice of appeal was given and the bond fixed at \$500. This suspends the judgment pending the hearing of the case *de novo* in the circuit court. Former

Judge Wilson and John C. Healy appeared for the defendant.—*Court Index*.

#### THE PROPER HANDLING OF TRUSTS.

The most difficult problem that must be solved in corporation reform is the proper handling of trusts or combinations to control the production and price of an article. This we have found may be done by a central corporation formed by managers of a score of establishments, or without such corporation by a trust agreement. The effort in either case is to abolish the law of competition in trade to increase the price of the product. Having fixed the prices, by fair or foul means, if necessary by threats, by the freezing out process, or by force and violence, they endeavor to maintain the prices fixed. It is needless here to discuss the various methods employed, for they are well known by all. They are contrary to the spirit of the common law, and hence have been vigorously assailed by all courts when acting upon the common law. From the beginning trusts have constantly increased amid various vicissitudes, until now nearly all articles of general manufacture are controlled or influenced by them. At the beginning of the craze for them it was prophesied that they would fail because of conflicting interests of members, the looseness of the organization and the disfavor of the law. They were consequently, expected to go out of style. But such has not been the case, and it is now seen how such combinations can be wholly prevented in view of their advantages to members and the modern means that enable concerted action.

Some indorse these combinations because they seem to be a natural development of modern industrialism, and anything natural in its development should not be checked. They assert that the government should by law recognize trusts and eliminate what is injurious, to bend them to the benefactions of the public. This is a very plausible plan, but it means for us to abandon the law of competition and to embrace socialism. For the logical conclusion would be the assimilation of all business by the state, the state being the ultimate combination beyond which we cannot go.

## ASSESSMENT LIENS.

In the case of the *City of Cincinnati v. Lingo et al.*, recently decided by the circuit court of Hamilton county, which was a case in which the purchaser of land at a judicial sale, under a petition for foreclosure of a mortgage and the marshaling of liens, seeks to enjoin the assertion by the city of an alley assessment lien against the property which became a lien thereon before the bringing of the suit in foreclosure, the city was made a party to the foreclosure suit, and in an answer and cross petition set up a balance due on a street assessment, which the court in the subsequent decree of distribution ordered paid; but by oversight or otherwise no reference was made to the alley assessment. At a later date it was sought by the city to assert a lien on account of the alley assessment, the contention being that the city is no more a proper party to such a suit than the state, under its claim for taxes, and that if made a party it is not bound to assert its claim, and if it sets up a claim which does not comprise all of its lien, it is not estopped by the adjudication then had from asserting the remainder of its lien at any time thereafter.

In a majority opinion, prepared by Judge Smith, it was held that this contention was not good; that a municipality does not possess the sovereign power of the state for the enforcement of such a lien, but stands in the same position as an individual; and that in this case the city, by reason of the proceedings and judgment referred to, is estopped from the enforcement of this alley assessment.

Judge Swing dissented from this opinion, on the ground that the city was not a necessary or proper party, and that the question of its lien was not before the court for any determination, and that the lien of the city had been fixed by the assessing ordinance, and unless directly set aside by a court in a direct proceeding, could only be relieved by payment, and that the mistake of any officer in saying what the amount of the assessment was, cannot bind the city, and that there does not arise in this case an estoppel.

We have the decision in full which we shall publish in our subsequent issue.

## THE CONTINGENT FEE.

[By J. A. Murphy of the West Superior (Wis.) Bar.]

The contingent fee as defined by Webster, is remuneration that is dependent on an uncertainty. The Irishman, when asked his definition, said: "If you lose your case, the lawyer don't get anything; if you win, you don't get anything."

The contingent fee has been defined by P. H. O'Brien as the anticipated and conspired result of industry, conscience and intrigue; by Heber McHugh as the *ne-plus-ultra* of the lawyer in desperation.

The contingent fee is difficult in discussion, analysis or definition; although nothing is better known, realized and comprehended in its practical phase among the profession. The contingent contract is necessarily somewhat shrouded and an object of concealment and suspicion, being an essential ingredient in and descendant of the champerty of the olden days. The bar for generations was hampered, annoyed and terrorized by this champertous vision ever recurring in practice—this barrier to progress, this embargo on the exercise of thrift, this menace to the only speculation within the compass of the lawyer's life. The culmination of this was the enactment of chapter 204, Laws of Wisconsin, 1891, with the singular title, "An act to aid impecunious litigants." As usual, the client appears in this enactment the beneficiary and the lawyer the philanthropist. By the terms of this statute, the client may in effect contract to place uncontrollably his destiny, his support, his hope, his conscience and his future in the hands of the thrifty lawyer.

When the plaintiff in the prospective damage suit, signs the contingent contract and delegates to the lawyer one-half of the recovery he fancies and assumes that in consideration thereof, he and all his kin will be supported by the contracting barrister. In most cases

he lays down all his burdens, his moral and legal duty to support himself and his family is merged, buried, absolved in the solemnity and compass of this contingent contract. He no longer is concerned with the petty, drastic details which burden life, but his vision rests in serenity on the spectacle of numberless easy thousands. Though not his good fortune to sustain injury in defense of his country and draw stipends therefor, he yet mentally readily reconciles himself to the role of a manufacturing or railway company pensioner. To his creditors he will say: "I have a damage suit and a lawyer." To his lawyer he says: "I am looking to you." This contingent client upon making of his contract almost invariably renounces toil and adopts ease and simulation.

"He limps along the streets,  
And he looks at all he meets—  
So forlorn;  
And he shakes his weary head,  
And it seems as if he said:  
'I am done.'

He says that in his prime,  
Before the box car hit his spine,  
And cut him down,  
Not a better man was found  
By the crier on his round  
Through the town.

But now his nose is thin,  
And it rests upon his chin  
Like a staff;  
And a crook is in his back,  
And a melancholy crack  
In his laugh."

His mission on earth during the months pending trial, is to court sympathy, to develop a malady and to feed in comfort on his contingent contract. His lawyer may grumble at his exactions, but what can he do? Will not the client say: "You explicitly agreed with me in terms all under the contract that you would pay all costs and expenses and all you would expect of me was to keep my mouth closed on that subject. Now, don't kick, or I will talk." So, in mute, inglorious anguish, the poor contingent fee lawyer struggles on and multitudinous are his struggles, and adept, subtle, varied must be his methods.

To make this contingency a reality, to convert theory and speculation into money, three things must exist. An accident has happened: the facts must fit the law, and a malady must exist primarily

or by development. He and his client have contracted and in terms conspired to wreck the fortunes of their corporation foe. How shall this be done? There must first be conducted an examination of the client's conscience, and if one is found to exist, here is the first impediment. There is molding to be done. Client may have had a Christian education; hence the necessity of adroitness. Singularly the easiest conscience to subdue is the one that is in the best state of preservation; the reason being that it was never used. But vital spots may be touched even in the moral composition of the personal injury litigant; for conscience is the place wherein there may dwell a few holy emotions. It is the battlefield of contending passions, but it is also the pandemonium of sophistry. And the lawyer whom the populace pronounces a success comprehends this.

The successful plaintiff's attorney in a personal injury case to-day must be an actor, lawyer, physician, surgeon, machinist, oculist, aurist and an intense metapsychician. The essentials of the knowledge of these various professions must be crystalized in the brain of the myriad-minded lawyer. All the depths and shallows, all the chimerical mysteries of these learned callings must be luminous and kaleidoscopic in the cometary sweep of this lawyer's illimitable mind. He must be an actor; must study and must know the manifestations of pain. When his client takes the witness stand, fresh from the hand of his lawyer, the result of his training and coaching for the ordeal is almost equivalent to a second birth. When this client mounts the witness chair, if he acts wisely, he will but reflect the training of his actor-lawyer. He should have that tired feeling in his face; the tremor of sadly impending dissolution in his frame; the deep, painful sigh as he places his crutches by the side of his chair. And then he should turn upon the jury an eye in whose melancholy recesses lurk the shadow of God's eternal frown—a hopeless gaze conveying to the jury by unvarying intuition the thought "there is nothing left for me but heaven and prayer." And a composite facial picture such as to leave no doubt of the truth and the application of Gray's epic—

"Lone dweller by the dusty way,  
Fair saint within a mossy shrine,  
The tribute of a heart to-day,  
Weary and worn, is thine."

His gaze should be hopeful, radiant, celestial; suggestive to the jury that, "I am not long for the toils of earth—I need but little here below, nor need that little long—but be bountiful, merciful to my loved ones at home."

If your client with whom you have contracted, and on whose words and actions hang the destiny of your contingent fee, happens to be a Finlander with a teaspoonful of brains your task will be more difficult—but this is your task.

This Finlander's husky, piping voice must be reduced and trained down to the utterance of a low, sweet, wailing speech, as if he had never in his life heard a harsher tone than a flute note. If client is kept on the stand for a long time he should manifest paroxysms of pain; and in this his work should never be coarse, for jurors sometimes possess a terrific prescience and probity of insight. He should never lose sight of his infirmity.

Theodore Thorson once said to a man with a small limp in his gait, "You have aukolosis," and the Swede said, "Yes, by Gad, I tank so." Surgery, anatomy and physiology should be mastered. Pat O'Brien was questioning a badly injured man with whom he contemplated entering into contractual relations of a contingent character, and every question Pat asked the man contained by way of innuendo a suggestion of the disarrangement of almost all of this poor man's functional organs. This man was tough; there seemed to be no limitations on his conscience; his language was sometimes shocking, but the liability was certain, and if a malady could be established the defendant corporation would have to jump.

No such physiological blunders as this should be made.

The lawyer should only be oratorical on the question of damages. And at this time he must, if possible, lead his mind away from a contemplation of his contingent fee. This is the only time when this should occur. The actor and the orator in the man should conspire to

moisten a few juror's eyes, and here consummate tact should be used by both lawyer and client. A quietly, softly sobbing female client is usually adequate, but if this condition is not present, then slight throat gastritis and short emotional choking with plenty of handkerchief application will do the business. But your client should weep at the proper time. I once knew a lady who burst into violent sobbing when her attorney read the Northampton tables.

It is better to have the contingent fee than no fee at all. It is inciting to ambition, it suggests and develops generalship and strategy, it reveals all the moral freaks and the mental acrobats. When the lawyer serves notice of his attorney's lien on the corporation, that imports that he is his brother's keeper. He is the sole repository of his client's mental and moral being. All things are by the compact referred to him. I knew a discharged brakeman who made a contingent contract with an attorney to develop an ordinary spine into a railway spine and institute a resulting damage suit. During the period of the spinal incubation and the pendency of the suit, the railway superintendent met the brakeman on the street and said: "Good morning, James; it's a fine morning." James, a trifle overtrained, replied: "I neither deny it or affirm it, sir."

Clients' conception of contingent fee vary wonderfully. Some of them struggle for a compound contingent—a reversion in fee—a remainder over.

A tax title shark once consulted me about foreclosing a mortgage. After informing me that by reason of long practical experience he was amply competent to foreclose it himself the only countervailing consideration with him being a desire not to rob the profession, and after remarking parenthetically—falsetto like, that, of course, I would be willing to foreclose it for the taxable costs—he wound up with the stupendous proposition that in the event that Judge Downer did not return in a certain time, in which event the judge was to foreclose the mortgage, and in the event that should I foreclose the mortgage by any accident, and if it should happen that the real estate should be bid in to him—then, in that event, he desired me to guarantee

him that I would within six months after the vesting of the title in him and without additional compensation, sell the property for him at a sum in cash far in advance of the mortgage value of the premises. Then my heart sank and "hope for a season bade the world farewell."

If they will only give a man a fairly robust contingency to operate on, well and good; but when they present to you as their ultimatum the ghostly remnant of a frayed out possibility, then the heart falters and one thinks of the ministry.

Many are the pitfalls in the way of the contingent fee lawyer. He may get past the court and get to the jury with a well-developed comminuted fracture, and this fratricidal jury by its verdict may pronounce it a comminuted fraud. He may be struggling boldly up the stony path carrying with him as a collision product a well-degenerated spinal cord with the attendant dullness on percussion on the abdominal wall, and have with apparent safety reached the goal and is about to place his burden tenderly, confidently in the sympathetic lap of the jury, this time dead sure—when he will hear from the bench the metallic, dirge-like intonation, "The doctrine *res ipsa loquitur* applies not here; the defendant's motion is granted."

Then comes the leaving the courtroom with heavy heart, the task of convincing your client that the court is an idiot, that the court's finding and decision in his case is the confirmation of the court's paresis, to gradually observe client's admiration for you wane and fade, to read in client's disappointed look a settled doubt as to your probity and merit, and the struggle to land an appeal, to stand off clerks, stenographer's fees, the wearisome brief and on the eve of the argument to learn by a terse notice from the defendant corporation that your client, being in distress, had applied to said corporation for relief; that said corporation had taken on an eleemosynary function and extended relief; in fact, had settled (of course without the knowledge or acquiescence of said corporation's local and trial counsel.) In short, you are informed that should you wish to take a justice court fee for a wrecked medulla oblongata valued at \$40,000, then indeed the

said corporation will freeze over its eleemosynary donation pond and you must seek fees from your absconded client, or solace in the mysteries and charms of contemplation. 'Tis then in this purgatorial ordeal the contingent lawyer can console himself with the benign reflection: "I should not give way to these trifling things. My mind to me a kingdom is; I am an honored member of a learned and liberal profession; this is but an incident; my client is but a man. My profession's mission spreads out into the illimitable field of righting all humanity's wrongs. My comfort is that my principle was right and it is for the principle I struggle. My client was false, but the individual is nothing. Men are but agencies of to-day and to-morrow cast into the oven, but within the scope and limitations of the grand principles which my profession are gradually advancing, the struggle I am making with its contingent success or failure is involved the weal or woe of generations yet to come."

There is some consolation in the fact that the profession is ever liberal in its award as to the sum to be paid when the contingency is removed—when the case is won.

And so time runs on in sunshine and in shadow, and the aggregated years have garnered up a heavy load of disappointment for the contingent lawyer as he treads the shadowy afternoon of life, still struggling. The disappointments, wrongs, misfortunes of a stormy, toiling past have placed him within the walls and limitations of a life of poverty. For him there is no resting place near life's drear close. No thoughtful, prayerful contemplation of the eternity beyond, no serenity of mind and conscience wherein faint dreams, like cool and shadowy vales, divide the billowy hours of love. The contingent lawyer must die in the harness.

And so with ambition buried away for years, with only the regrets of life remaining, with the darkening pall of gloom of old age pressing down upon him, he struggles and journeys on to where the dusk is waiting for the night, and mutters in his last expiring accents: "Life and all its problems are contingent. I tried it through the medium and instrumentality of the law. I failed."

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EDITED BY J. F. LANING.  
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*The growth of this paper during 1896 has been so marked that we confidently assert that it now has a greater circulation than any other Ohio law paper. It also contains so much more legal matter that we are justified in claiming it to be the leading paper in its class.*

## OHIO STATE REPORTS.

Volume 54, Ohio State Reports, is now ready for delivery, and may be obtained at \$1.50 per volume, payable in advance.

A remarkable defense was attempted in a case tried before Justice Armstrong, of Columbus, last week. The case was brought to recover \$150 alleged to be due for five months' rent. According to the particulars of the suit, the defendant leased the property for a term of three years, and after living in it about six months, moved out without securing a release from the contract. Five months' rent accumulated in this way, and the plaintiff brought suit to recover it. The defendant tried to offer testimony that the house had been used for immoral purposes, that the occupants had sold liquors to minors and persons already under the influence of liquor, and that they had otherwise violated state and municipal laws within the house. The purpose of this testimony was to show that the lease had been violated by infractions of the law that had occurred under the roof of the premises. The attorney for plaintiff objected to the introduction of this testimony on the ground that its tendency was to incriminate the witness. The justice sustained the objection and the defense rested the case.

The circuit court of Sandusky county, last week Thursday, handed down a decision in a case which will be of interest to all the oil producing counties in the state. The last general assembly passed a law providing that all taxes collected from oil wells not to exceed \$2,500 should be returned to the townships wherein said wells are located and be devoted for road purposes. The auditor of Sandusky county, acting under instructions from the state officials, refused to turn over an order for the oil taxes collected in that county to the township treasurers, and eight of the townships decided to have the constitutionality of the law tested. Therefore a suit for a writ of mandamus was commenced and argued before Judges King, Haynes and Parker, judges of the circuit court. In

their decision the judges give as their opinion that the law is unconstitutional and that all oil taxes, therefore, be distributed to all parts of the county *pro rata* and not used for any certain townships. The circuit court dismissed the petition, which will probably be carried to the supreme court.

The questions whether the statutes relating to national banks, prohibiting them from purchasing or subscribing to the stock of another corporation and whether the want of authority can be urged by the bank to defraud an attempt to force against it the liability of a stockholder were passed on by the supreme court of the United States in the case of the California National Bank v. Nat. Kennedy. It was held that the California National Bank of San Diego held 990 shares of stock of the California Savings Bank, the former having suspended on November 12, 1891, and the latter on December 29, 1891. The supreme court of San Diego county held that the national bank was responsible to the creditors of the savings bank to the amount of \$18,507, the former making the defense indicated above.

The court holds that a national bank has no right to deal in stocks, although it may hold securities, but it may plead its want of power as defense in case like that in question. The transaction in the stock of the savings bank is held to have been void and the judgment of the supreme court of California against the National Bank is reversed.

At the request of Attorney-General Monnett, the case of burglar Jim Anderson recently decided by Judge Pugh of the Franklin common pleas court is to be taken to the supreme court. Judge Pugh decided that Anderson could not be tried on the charge of being an habitual criminal because he was pardoned by Governor Bishop while serving on his previous term in the penitentiary. The attorney-general desires to have the supreme court pass on the question involved in this case, as the decision of Judge Pugh may operate to nullify absolutely the habitual criminal act. By one construction, every convict who has served out

his sentence is pardoned. On leaving the penitentiary a convict is handed a document signed by the governor which restores him to citizenship. If the restoration to citizenship is construed to be a pardon, then every prisoner is pardoned, and under this decision it is thought no prisoner could be sentenced for life as an habitual criminal. The restoration paper is an executive favor. The governor might refuse to issue it, though he never does. Therefore the point involved in the decision of Judge Pugh is of the greatest importance, to lawyers and to the public everywhere, and the determination of this question by the supreme court will be awaited with a great deal of interest.

Judge Hieserman of the Darke county common pleas court, had occasion to decide several important questions of criminal practice last week. It appears that when Z. T. Lewis, the bond manipulator, was indicted by the grand jury that his attorneys filed a motion to quash one indictment on the ground that the foreman of the grand jury had signed the indictment as a clerk and not as foreman. A motion was also filed to require the prosecuting attorney to elect upon which indictment Lewis would be tried. They also filed a plea in abatement, on the ground that twenty indictments had been returned for the Farmers' Bank of Mechanicsburg and ten for the Perpetual Building Association of Urbana. The attorneys held that as the bonds in these transactions had all been deposited at the same time there could be but one offense in each case and not a separate indictment for each bond. Judge Hieserman overruled all motions. In the motion to quash the indictment on the ground of its not being properly signed by the foreman of the grand jury, the court overruled the motion because the records of the court showed that L. H. Runyan was foreman of the grand jury and because he signed his name in the wrong place was not sufficient grounds to quash the indictments. The motion to require the prosecutor to elect on which indictment the accused should be tried was also overruled. In the matter

of the plea in abatement the court held that the proper proceedings was to show that the different indictments were in fact the same offense, it would be necessary for counsel for defense to attack the proceeding by a plea in bar, which can only be done after a plea of guilty, conviction, or acquittal.

An important and highly interesting tax case was decided by the circuit court of Cuyahoga county last Saturday. The title of the case was, *The County Treasurer v. Charles T. Brush*, and the question involved was whether foreign corporations, which pay taxes on all their property located in this state, are also liable to pay taxes on their stock.

According to the law of the state, corporations are not compelled to pay taxes on their shares of stock, where they pay taxes on their capital stock. The defendant contended that the same rule applies to foreign corporations which pay taxes on their capital stock in this state. County Solicitor Kaiser maintained that this was not true, while the Supreme Court has never quite decided this question, although it has decided points all around the issue involved in the case. And, owing to this fact, the decision of the circuit court will be doubly interesting.

The corporation which has been the means of bringing up this interesting question was incorporated under the laws of West Virginia, and the circuit court, after reviewing the case, rendered the following decision:

"We hold that although the corporation was incorporated under the laws of West Virginia, yet having its principal place of business in this state and its business being with the state and its property within the state and subject to taxation, the shares of stock in that corporation are exempt from taxation. This results in the dismissal of the petition and a decree will be entered by the plaintiff and a like decree may be taken in this court as expressed in the lower court."

This decision will be a death blow to all counties endeavoring to collect such taxes against like corporations in the state.

#### ADMITTED TO THE BAR.

The graduates of the Cincinnati Law school having passed a successful examination were sworn in before the supreme court last week Thursday. Fifty-three of the fifty-seven graduates were in the party and those sworn in are as follows:

John Guy Atkinson, Columbus.  
Martin Alvin Bender, Akron.  
Adolph Birnbryer, Cincinnati.  
Rea Morton Bonifield, Zanesville.  
Charles Paul Brown, College Hill.  
Edmund Theopolis Clayton, Cincinnati.

Frank Wright Cottle, Cincinnati.  
Charles H. Conley, Marion.  
Homer C. Fulton, Lovett.  
Frank Preston Garrison, Westwood.  
Arthur Edwin Georgi, Cincinnati.  
Robert Lewis Granger, Cleveland.  
Francis Marion Hamilton, Lebanon.  
Everett Winslow Hobart, Cincinnati.  
Alfred Holzman, Cincinnati.  
John Wilbur Jacoby, Marion.  
Isaac M. Jordan, Jr., Cincinnati.  
J. Forest Kitchen, Springfield.  
Leo Edward Kuhlman, Cincinnati.  
David Mosely Levy, Cincinnati.  
Griffith Charles Little, South Norwood.  
Harry Brent Mackey, Cincinnati.  
James Robert Magoffin, Cincinnati.  
Randolph Matthews, Cincinnati.  
Thomas Alfred McFarland, Zaleski.  
Frank Armstrong McGee, Cincinnati.  
William Roudebush Medaris, Cincinnati.

William Conrad Meyer, Cincinnati.  
Frank Everett Monfort, Lebanon.  
Arthur Russell Morgan, Cincinnati.  
Walter Francis Murray, Cincinnati.  
Harry John Nichols, Marion.  
Frederick Edward Niederhelman, Cincinnati.

Alfred Kuno Nippert, Cincinnati.  
Robert Clarence Patterson, Dayton.  
Pasco Learned Richards, Cincinnati.  
Lincoln Field Robinson, Cincinnati.  
Oméga Rogers, Cincinnati.  
Anthony Ronnebaum, Cincinnati.  
James Sanders Richards, Cincinnati.  
Victor Hugo Schafer, Bond Hill.  
Charles Franklin Shaver, Canton.  
William Walker Smith, Jr., Cincinnati.  
Arthur Conrad Straehley, Cincinnati.  
Richard Rudolph Tafel, Cincinnati.  
Robert Wilson Thrift, Jr., Lima.

Charles Harman Urban, Cincinnati.  
Oris Jacob Van Pelt, Port Williams.  
William Henry Vodrey, East Liverpool.

Mary Warwick, Cincinnati.  
Erie Jacob Weaver, Dayton.  
Charles Finn Williams, Cincinnati.  
Frank Ebersole Wolcott, Cincinnati.

#### STREET RAILWAYS—NEGLIGENCE.

[Hamilton Common Pleas Court, May, 1897.]

ALTEMEIER V. CINCINNATI STREET  
RAILWAY CO.

#### CHARGE TO THE JURY.

[Delivered by Judge Samuel W. Smith, Jr.]

*Gentlemen of the Jury:* The plaintiff, Herman Altemeier, administrator of the estate of Albert Altemeier, deceased, complains of the Cincinnati Street Railway Company, a corporation under the laws of the state of Ohio, in this, that the defendant company on the 1st day of November, 1893, caused the death of said Albert Altemeier, alleged to be a minor between twelve and thirteen years of age, by the negligence of said company and of its servants in the operation of its cars at a crossing in Avondale, in this county. It is also alleged that Albert Altemeier, deceased, was a passenger upon the car of defendant company, and left surviving him his father, Herman Altemeier; his mother, Wilhelmina Altemeier, and Henry Altemeier, Fred. Altemeier, William Altemeier, Edward Altemeier, Joseph Altemeier, brothers, and Katie Altemeier, a sister, next of kin, and that by reason of the death that these, his parents and brothers and sisters, were damaged in the sum of ten thousand dollars. The claim is then that the defendant company, by its negligence, caused the death of Albert Altemeier.

To this petition the defendant files an answer amounting to a general denial of the allegations in said petition. As I have before told you, negligence has been defined to be the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human

affairs, would do; or the doing something which a prudent and reasonable man would not do. In other words, it is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or the doing what such a person under the existing circumstances would not have done; and contributory negligence is such negligence as the evidence may show the injured party himself was guilty of, which directly contributed to his injury. It is, therefore, necessary for you to determine in this case by whose fault or negligence the accident happened.

It is claimed that deceased was a passenger upon said defendant's car. A passenger is one who has taken a place on a public conveyance for the purpose of being transported from one place to another. Anyone may become a passenger by applying for transportation to a carrier of passengers. The relation of carrier and passenger can be created by the exhibition of a *bona fide* intention on the part of a passenger. It is, therefore, for you to say from the evidence in this case whether or not the deceased was a passenger, whether or not his conduct and that of the railway company shows him to have been a passenger.

If the jury believe from the evidence that the deceased was a passenger upon the car of the defendant, then it was the duty of the defendant, with a view to secure the safety of its passengers, to exercise the highest degree of care towards said deceased as distinguished from ordinary care (and by the term "highest degree of care" the court means all the care and diligence possible in the nature of the case); and if while a passenger, if you find deceased to have been such, and without any fault on his part the said deceased was injured, and said company did not exercise the highest degree of care towards said deceased, then said plaintiff is entitled to recover.

But if you find from the evidence that said deceased, although a passenger, and although a passenger at the time of the injury, was guilty of contributory negligence, and that such contributory negligence was the approximate cause of the injury, then I charge you that plaintiff cannot recover, although said defendant

did not exercise the highest degree of care towards the deceased.

If, however, you find from the evidence that deceased was not a passenger when injured, and if deceased undertook to cross the street at this crossing, if there was a crossing there, then the defendant company is charged with the duty of exercising, in the operation of its cars and in the management of the same, only ordinary care—such care as men of ordinary prudence are accustomed to exercise under such circumstances.

The use of the streets for railways is allowed only because it is considered not to be a substantial interference with their free and unobstructed use as highways for passage. So long, therefore, as there is no unreasonable interference with the public right of passage, railways in street are lawful structures. The care that one may give may be but ordinary, and yet the circumstances may require that greater or less personal attention may be given to the subject in hand. That is, one may be about a thing which may require but little attention, he may be safe, and others with whom he may come in contact may be safe, by the exercise of but little personal attention to the thing done. He may, on the other hand, be at something else that may reasonably and prudently require much greater attention, having greater danger connected with it, and yet they would in both cases be but the exercise of ordinary care. In determining whether the defendant was negligent, and also whether such negligence caused the injury and death of Albert Altemeier, you should consider all matters bearing upon the subject which the court has permitted to be given to you in the testimony. You should consider the speed of the car, the north bound car and the south bound car at or near the crossing, the character of the travel upon the crossing at that place and time, as to whether the gong was sounded or not, and such matters as have been brought out before you in the evidence.

But before you can find negligence in either of these matters referred to, which is pertinent to the issue before you, you must determine that such omission of duty, if it was omitted, was the cause of the injury in controversy. Although you

may be of opinion that the car may have run swiftly, and that it was negligent to so run it, yet before that becomes a factor in this controversy you must satisfy your mind also that by that act injury was caused to the deceased, otherwise it would have no pertinency whatever to the issue; and the same may be said with regard to such other acts or omissions as above mentioned. Considering all these matters, and considering them separately or in conjunction as you may find from the proof they did occur or did not occur, you should say from them all whether there was a want of ordinary care in the operation of the car which directly caused the injury to Albert Altemeier. If you are satisfied by a preponderance of the proof that there was such negligence, and that the death was caused by reason of such negligence, and without the contributing fault of the boy, then your verdict in that respect should be for plaintiff.

The burden is on the defendant to have satisfied you of the contributing negligence of the boy, unless the plaintiff, in producing the various testimony on his behalf, has offered testimony which, in your judgment, tended to show negligence upon the part of the boy. If he did, if there is such testimony tending to show negligence causing the death of the boy, as given in the testimony by plaintiff, then the burden is upon plaintiff to first acquit his cause and overcome by other proof such evidence tending to show negligence upon the part of the boy.

If the place of the accident was a crossing, used as such by the public and recognized as such by the company, it was the duty of the company to keep in mind the right of pedestrians on that crossing, and its duty to observe the rights of its own patrons who were under a necessity of using that crossing in going from its cars to their destination.

In the application of the doctrine of contributory negligence to children in actions by them or in their behalf for injuries occasioned by the negligence of others, their conduct should not be judged by the same rule which governs that of adults; and while it is their duty to exercise ordinary care to avoid the

injuries of which they complain, ordinary care for them is that degree of care which children of the same age, of ordinary care and prudence are accustomed to exercise under similar circumstances.

It is a remarkable and necessary rule that a higher degree of care should be exercised toward a child incapable of using discretion commensurate with the perils of the situation than one of mature age and capacity. Children wherever they go must be expected to act upon childish instincts and impulses.

In determining the question of care or negligence on the part of the Altemeier boy it is the duty of the jury to consider his age as you may find it from the proof (the father, I believe, testified he was between twelve and thirteen years of age); to consider what prudence and care a boy of ordinary prudence ought reasonably to have exercised and would be accustomed to exercise under the circumstances of like age. You are not to judge him, then, with that rule as to prudence that you would if he were much younger or if he were a man, but use your experience in life and adjudge the boy's conduct according as you think boys of that age of ordinary prudence ought and reasonably would act under all the circumstances in proof.

An accident, gentlemen of the jury, is where neither person is at fault. If you should find neither to be to blame, and that it was one of those occurrences which human foresight in the exercise of ordinary prudence would not have discovered and avoided, then there can be no recovery.

If you find in favor of the defendant, that is, if you fail to find by a preponderance of the proof that the boy was killed by reason of the negligence directly contributing thereto by the railroad company, or if you find that the boy contributed to his own death by his own carelessness, then there can be no recovery.

If you find in favor of the defendant your verdict will be simply for the defendant.

If you find in favor of the plaintiff then it becomes your duty to assess the amount of recovery.

The plaintiff claims damages in the

sum of ten thousand dollars. That is the limit which the statute permits in any such recovery. But, gentlemen of the jury, if you find in favor of the plaintiff you are to assess what the damage appears to be from the proof before you. The proof sets forth the respective brothers and sisters and the father and mother, giving the ages of a part if not all of them.

In arriving at the total amount of damages to be awarded under the statute, the jury should consider the pecuniary injury to each separate beneficiary (not found guilty of contributory negligence), but return a verdict for a gross sum.

As to any beneficiaries whom you may find guilty of contributory negligence, no damages should be awarded on their account, and the jury should find in its verdict which, if any, of the beneficiaries were guilty of such contributory negligence. The sole right of recovery is pecuniary. There is no compensation to be permitted to enter into the verdict for the bereavement of the next of kin or of the parents; nor for the loss of society of such person, nor for the pain and suffering, either of them, in their grief for or of him who was killed. But it is your duty to consider what reasonably and probably would be the pecuniary benefit, if any, to the father and mother, the brothers and sisters or next of kin in the event he had lived, except such as you may find guilty of contributory negligence. It is your duty then to consider the prospects of the boy. There is no specific testimony on this, and it would not be permitted to offer any proof to undertake to say to you in dollars and cents what that damage would be. The law leaves it to the just judgment of the jury to be swayed by no other considerations than that of undertaking to make up a just estimate that you may place upon pecuniary advantage, the advantage in money, that it would have been to this family had this boy not been killed by this car.

Gentlemen, take the case.

[The jury found for the plaintiff in the above case, and assessed his damages at \$4,000.]

**SUPREME COURT OF OHIO.****Official Record of Proceedings.**

COLUMBUS, O., June 1.

**General Docket.**

5224. Albert J. Lutman, et al. v. The Lake Shore & Michigan Southern Railway Company. Error to the circuit court of Wood county.

**BY THE COURT:**

A suit to enjoin the assessment upon the lands of the plaintiff, of a portion of the costs of constructing a township ditch upon the ground that his lands will not be benefited thereby, is prematurely brought if the trustees have taken no steps to make such assessment, and unless the trustees in their answer assert the right or admit their intention to make such assessment, a judgment in favor of the plaintiff for an injunction and for costs is erroneous.

Judgment reversed.

4547. Howard Miller v. Mamie Busick. Error to the circuit court of Licking county.

**BY THE COURT:**

Where, at the trial of a bastardy suit in the court of common pleas, the examination of the complainant taken before the justice of the peace is offered in evidence in conformity with section 5625, Revised Statutes, and the record shows full compliance by the justice with all the requirements imposed upon him by the chapter regarding bastardy, save that the examination was not subscribed by the complainant, and the defendant has appeared in the common pleas in obedience to his recognition, and, without objection, entered his plea, and entered upon the trial to the jury, it is not error to admit such examination in evidence over the objection of defendant. Judgment affirmed.

4687. Jacob Henn v. William Horn. Error to the circuit court of Cuyahoga county.

**BY THE COURT:**

Where, at the trial of an action for libel, the plaintiff has given evidence tending to show a right to recover punitive damages, evidence by the defendant as to his feelings towards plaintiff, and his motives in the publication, is competent as bearing upon the question of such damages. Judgment affirmed.

4139. Frank Lowe v. C. S. Hunsicker et al. Error to the circuit court of Pickaway county. Dismissed by real parties in interest.

4513. The Alliance Standard Review Publishing Company v. Fannie L. Valentine. Error to the circuit court of Stark county. Judgment affirmed.

4638. Jacob Henn v. The Board of Publication of the Evangelical Association of North America. Error to the circuit court of Cuyahoga county. Judgment affirmed on the authority of Henn v. Horn.

4641. The Lakeside & Marblehead Railroad Company v. William Kelley. Error to the circuit court of Ottawa county. Judgment affirmed.

4657. Harriet W. McAlpin v. Alexander Clarke et al. Error to the superior court of Cincinnati. Judgment affirmed.

4686. Alexander Heingartner et al. v. William McLean. Error to the circuit court of Tuscarawas county. Judgment affirmed.

4690. Edgar Huide-Koper, Executor, v. Louisa H. Perry. Error to the circuit court of Lucas county. Petition in error dismissed by plaintiff in error on leave granted by this court.

4856. The Iron Railway Company v. The Lawrence Farnace Company et al. Error to the circuit court of Lawrence county. Judgment affirmed.

4886. Harriet McAlpin v. Alexander Clark et al. Error to the circuit court of Hamilton county. Judgment affirmed. The question argued is not presented by the record.

5217. The Wheeling & Lake Erie Railway Company v. George F. Weaver. Error to the circuit court of Sandusky county. Judgment affirmed.

5238. American District Telegraph and Messenger Company v. Charles S. Paddock. Error to the circuit court of Cuyahoga county. Dismissed by consent of parties at costs of plaintiff in error.

5446. Grant Garrett v. The Standard Life and Accident Insurance Company. Error to the circuit court of Marion county. Judgment affirmed.

5380. The State of Ohio, on relation of Frank S. Monnett, Attorney General v. Walter D. Guilbert, Auditor of the State of Ohio et al. In mandamus. Demurrer to petition sustained, petition dismissed, and Torrens act held unconstitutional. To be reported.

**New Cases.**

New cases filed in the Supreme Court since May 19, 1897.

5570. William Bitzer et al. v. R. H. Morrow et al. Error to the circuit court of Fayette county. Post & Reid and Humphrey Jones, for plaintiffs. Mills Gardner, for defendants.

5571. Struthers, Wells & Co. v. The Buckeye Supply Co. et al. Error to the circuit court of Mercer county. W. W. Chapman, for plaintiff.

5572. The State of Ohio ex rel. Frank Bachman v. Edwin Wright. Error to the circuit court of Darke county. Anderson & Bowman and Williams, Knickerberger & Robeson, for plaintiff. Knox, Gaskill, Allread, Teegarden, Stubbs and H. Miller, for defendant.

5573. John M. Kerr v. The Board of County Commissioners of Franklin County. Error to the circuit court of Franklin county. C. T. Clark, for plaintiff. Henry A. Williams, for defendant.

5574. Stephen C. Kingman v. E. Y. Kingman et al. Error to the circuit court of Morrow county. S. C. Kingman, for plaintiff. Harleim & Wood, for defendant.

5575. Peter Dietrich v. Augusta Dietrich. Error to the circuit court of Hamilton county. Von Seggern, Phares & McDonald, for plaintiff. Ben. B. Dale, for defendant.

5576. George Johnson v. State of Ohio. Error to the circuit court of Coshocton county. A. M. Nicholas and T. H. Wheeten, for plaintiff. W. R. Pomerene, for defendant.

5577. J. B. Tangeman v. H. W. Conklin. Error to the circuit court of Miami county. Byrket & De Weese, for plaintiff.

5578. The P. & L. E. R. R. Co. v. Catherine Cousins. Error to the circuit court of Mahoning county. James P. Wilson, for plaintiff. A. J. Woolf, for defendant.

New cases filed in the Supreme Court since May 26, 1897.

5579. The State of Ohio v. Louis F. Post. Error to the circuit court of Cuyahoga county. T. L. Strimple and M. R. Dickey, for plaintiff.

5580. The State of Ohio ex rel. Board of Commissioners of Pickaway county v. The Board of County Commissioners of Fayette county. Error to the circuit court of Fayette county. Abernethy & Folom, for plaintiff. Post & Reid, for defendant.

5581. Annie M. Head v. Abram M. Chesbrough. Error to the circuit court of Lucas county. King & Tracy, for plaintiff. C. W. Everett, for defendant.

5582. The Bruce Electric Light Co. v. James Datton. Error to the circuit court of Hamilton county. Paxton, Warrington & Boutet, for plaintiff. Bateman & Harper, for defendant.

5583. Harvey Terry v. John W. Davy. Error to the circuit court of Franklin county. Harvey Terry, for plaintiff. D. T. Ramsey and J. V. Lee, for defendant.

5584. Edward Foutz v. Manley L. McGee et al. Error to the circuit court of Perry county. Donahue, Spencer & Donahue, for plaintiff. Herbert Butler, H. D. Cochran and Donahue, Spencer & Donahue, for defendant.

5585. The Village of St. Marys v. The Lake Erie & Western R. R. Co. Error to the circuit court of Auglaize county. J. T. Schoenover for plaintiff. Layton Steeve, for defendant.

5586. Elmer G. Hull et al. v. Nathan Hill. Error to the circuit court of Jackson county. E. B. Bingham and Moore & Smith, for plaintiff. T. A. Jones, for defendant.

5587. The Buchanan Bridge Co. v. James K. Campbell et al., Commissioners. Error to the circuit court of Fulton county. W. N. Louville and James Hurst for plaintiff.

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## THE FOREMOST OHIO LAW PAPER.

*The growth of this paper during 1896 has been so marked that we confidently assert that it now has a greater circulation than any other Ohio law paper. It also contains so much more legal matter that we are justified in claiming it to be the leading paper in its class.*

## OHIO STATE REPORTS.

Volume 54, Ohio State Reports, is now ready for delivery, and may be obtained at \$1.50 per volume, payable in advance.

They have a good one just at present on a well-known Bangor lawyer who is noted for his absent-mindedness. He went up his own stairs the other day and seeing a notice on his door. "Back at 2 o'clock," sat down to wait for himself.

The late decision of the Ohio supreme court, holding certain sections of the mechanics' lien law unconstitutional, is to be reviewed by the United States court of appeals of the sixth district. The question will be raised in the case of the Jones & Laughlin Iron Company, of Pittsburg, Pennsylvania, which appeals against the Great Southern Hotel Company, of Columbus.

## LEGAL NOTICES.

The following is an extract from a recent decision of the supreme court of Indiana, relative to publication of legal notices in court papers:

"Its special purpose is to give the news of the court and to circulate this news generally amongst all those, who, whether of the legal profession or not, may be interested in such proceedings. We are, therefore, unable to see how the end proposed in the statute, namely, to reach by publication a party interested in a suit in court, could be better attained than by publication in this newspaper.

"In the case before us the newspaper circulated to a great extent amongst persons whose business it is to carefully watch the proceedings of the courts; and through such persons, if not directly, those interested are better enabled to receive knowledge of the matter before the court than if the notice were printed in a newspaper whose readers might not give so much attention to court proceedings."

A case of interest to lessees of land and oil operators has been decided in the Jefferson circuit court, recently, and the result, in favor of the lessor is likely to produce a number of similar suits. One Joshua Moores brought suit against the Castner Oil Company for rental for his farm under a contract which provided that a well was to be drilled on the farm or in the vicinity, or they were to pay the rental. The oil company drilled a well nearly two miles away and maintained that it was in the vicinity. A justice, and a jury in the common pleas court gave Moores a verdict for the full amount, and the circuit court affirmed the decision of the lower court. It was held that, had the well been drilled on an adjoining farm, it might have been in the vicinity, but with several farms intervening, it was not.

Last week, Thursday, Judge Wright of the Hamilton common pleas found that S. B. Hayman, had unfaithfully discharged his duties as a notary public, and was removed from office as a notary public of Hamilton county, and ordered to pay the costs. The entry directs that a copy of the charges and specifications, and of the judgment of the court be forwarded to Governor Bushnell.

Hayman's offense was that of certifying in blank to receipts for salary, afterwards fraudulently filled out by George Hobson, and the money collected on them by him. The excuse offered to the court for so doing was that he, Hayman, expected to be present when the receipts were signed by the persons who were to sign them, but after the receipts passed to Hobson's hands he was unable to get them back again, and had no notice as to when they would be filled out.

We publish this week the paper of William S. Garber, Esq., read before the Century Club of Indianapolis, March 2, 1897, entitled "Human Nature in Court." The subject is one of popular interest and was exceedingly well received when read and has excited wide comment since.

Mr. Garber, in addition to much natural and acquired intelligence, has had a

wide experience which enables him to write understandingly as well as entertainingly upon this subject. Nearly twenty years ago he was one of the official reporters in the United States senate, and subsequently was on the New York Herald, and also private secretary to John Russell Young, author of a history of General Grant.

Mr. Garber was one, if not the first official court reporter, in shorthand work at Indianapolis, which position he still retains. He is also one of the proprietors and publishers of the "Courier" at Madison, Indiana, is a son of the late Col. Garber, who was formerly the editor and proprietor of that paper.

We have no doubt the publication of this paper in the LEGAL NEWS will prove quite interesting to our readers.

#### HUMAN NATURE IN COURT.

(Paper of William S. Garber, Esq., read before the Century Club, Indianapolis, March 2, 1897.)

I am not sure that I know exactly what is meant by the expression "human nature." I do not know whether it is human nature or, something worse, in the plumber, that makes him leave as soon as he has the floor torn up, the water turned off, and the house made uninhabitable; that makes most of us exhaust the wrong places before looking in the right place for a missing paper; that makes us more likely to guess wrong than right when there are only two ways of guessing. I know it is quite common to hold human nature responsible for many things with which it has not the slightest concern. "Adam was human; that accounts for it all," says Pudd'nhead Wilson in his Calendar; but I am not prepared to say that human nature has any more to do in making men mean, selfish and trifling, than it has in making them just, generous, self-sacrificing and capable. Even animal nature is slandered a good deal, and human nature, though we excuse many of our faults and frailties by reference to it, must be better than common, ordinary, outdoor nature, inasmuch as it has Divine attributes. If this paper is found to follow the well worn path, and dwells mainly upon the foibles of humanity as

peculiarly exhibiting human nature, I wish in advance to disclaim such purpose. At best they but exhibit one side of it. I take the expression refers more especially to those peculiarities and characteristics which are common to the race, and which manifest themselves in all under like or somewhat similar circumstances when the subjects of observation are thrown off their guard, and when the surrounding conditions are sufficiently new and unfamiliar to cause them to act from nature, or impulse, instead of from habit, thought or experience. Men do not exhibit natural qualities so much in the ordinary routine duties of life. Busy men are pretty much the same the world over, because being busy is an artificial condition, a state abhorrent to the natural man. The natural man is indolent; he does not like to be busy and is not, except upon compulsion. A great German traveler, being asked if there was any characteristic possessed in common by all races of mankind, replied, "All men are lazy."

Therefore, those who affect the study of mankind seek places where men congregate in idleness, for pleasure and amusement, or where they meet in a semi-business capacity. They get the most picturesque results from crowded streets, places of amusement, street cars, railway and other public conveyances.

A few years ago the Tombs, Five Points, Harry Hill's Dance House, the Bowery and Barclay street were usually recommended to the stranger visiting New York, as the best places to study human nature. Sometimes they would be recommended as good places to see life in its various phases, etc., and this was perhaps more accurate than the other expression. They were good places to see a certain condition of life, but a condition as far from exhibiting the common traits of humanity as the circles of the four hundred; for artificial conditions and surroundings have warped the one as far from nature as vice and degradation have the other.

While beer gardens, corner groceries, hotels, public conveyances, political meetings, and all places where men congregate for entertainment, or are brought together by circumstances and motives apart from those connected with their

regular pursuits, afford opportunities, probably the best place to observe human nature, pure and simple, is the court room, where it is, in a measure free from the influences of daily habit, and not obscured by the more noticeable manifestations of vice and degradation. In the court room men and women of all classes and pursuits, attorneys and court officers excepted, are taken out of the course of their ordinary life; they are stripped of the veneer acquired in their usual associations, and subjected to tests and experiences new to them, which come upon them without notice, and pull upon untried strings and chords in their mental makeup. The influences of environment and habit are in great degree lost. They are interested actors and actresses in the drama that is being presented, rather than mere spectators; but they have had no opportunity to learn their parts, and do not know their cues to speak or act or remain silent, as they would at home, or in their shops or places of business; but they never lose sight of the fact that they are in the cast, or underestimate the importance of their role. They are moved, and in turn restrained, by the strongest motives that influence men and women; and each has to play his part, go through his lines, without rehearsal or prompter. Human nature under such circumstances is likely to be exhibited at its best and worst.

Judges and attorneys, being busy men engaged in their ordinary work, and controlling the situation in great measure, not, perhaps, exhibit so much human nature as litigants, witnesses, and jurors. Still, it is now and then apparent that they were not overlooked in the distribution of frailties bequeathed to us by father Adam. Under the circumstances referred to, the display of human nature by counsel is seldom more serious than is involved in sternly reproving a witness for volunteering, as he terms it, evidence that does not happen to fit his theory of the case, and which the witness innocently imagined to be the very thing called for by perhaps an ambiguous question; or more sternly lecturing the unfortunate occupant of the box for the irrelevancy of some remark he has been led to make in reply

to some equally irrelevant comment of counsel on a previous answer. As for the judges, the high position they occupy, the grave responsibility resting upon them, and the respect with which they are regarded and treated by the Bar, and, indeed, all who come in contact with them, seems to strengthen their character, and eliminate, or at least in large degree enable them to suppress, many exceedingly human tendencies. The patient attention they give counsel and witnesses when realizing so much better than counsel can, that the time and temper being spent on some particular point is entirely out of proportion to its importance, is noticeable at all times; but still they are common clay also, and cannot avoid occasionally giving evidence of the fact. Sometimes it is by a certain facetiousness which is well received by everybody except the poor fellow who happens to be hit, but is all the more galling to the person who constitutes the solitary exception from the fact that he cannot strike back. It is more serious when it manifests itself in arbitrary conduct and rulings, but this is not common, though the habit is sometimes unfortunately developed by long service on the bench; but then the many excellent judicial attributes developed at the same time may be set off against this weakness. When the court happens to be a justice of the peace the tendency to find against the party that can pay costs, is said to be a human failing; but about this I express no opinion. Illustrating the most common display, first alluded to, some time ago a lawyer called as a witness remarked as he took the stand:

"It is said, a good lawyer makes a poor witness." Leaving the stand after a rigorous cross-examination, in which he probably did the best he could, the court remarked: "If the converse of the proposition you stated on taking the witness-stand is true you have demonstrated your ability as a lawyer."

The part jurors take in proceedings in open court is of course restricted, but their verdicts, and the manner of arriving at them, afford amusing illustrations of their susceptibility to influences and considerations, which if not legal, are very human. In no animal except man is the spirit of

compromise found at all; and nowhere else in man will it be found as manifested in the jury box. Facts are said to be uncompromising things, and must, like truth, always consist; but jurors often reach conclusions that consist with none of the facts proved in the case, by exercising the human expedient of compromise in a most unique and extraordinary manner. In a suit for damages, growing out of an assault and battery case, one set of witnesses swore most positively that at the moment of the assault the defendant advanced on the plaintiff and the plaintiff stood still; another set of witnesses swore with equal positiveness that the plaintiff advanced upon the defendant and the defendant stood still. The jury, after deliberating some fourteen hours, answered an interrogatory upon this point to the effect that "the plaintiff and defendant advanced on each other simultaneous."

Another approved method of reaching a unanimous verdict, that it is said used to be more or less resorted to; was to select out of the twelve men, good and true, the four best seven-up players, two to represent the plaintiff, and two to represent the defendant, the finding to abide the result of the game. If there were not four players of about the same skill on the jury representatives of the plaintiff and defendant might toss pennies for it. If the main issue should be thus determined in favor of the plaintiff, the amount of the verdict is easily reached by each juror putting down on a piece of paper the amount that the plaintiff in his opinion is entitled to, adding the twelve amounts together and dividing by twelve. This method has not gone into disuse. It is objectionable because of the advantage it gives old and experienced jurors over those newer in the business, the old timers having learned when they were for the plaintiff, to put their figure up high enough to bring the sum reached by averaging the twelve amounts to about what they think the verdict ought to be.

It is well known that the fact that there is a woman on one side, especially if she is young and good looking, has a great deal of weight with jurors, which is creditable to the innate gallantry of the race, if it does not indicate ability to

discriminate nicely between the abstract rights of parties. In the jury room the scales of justice also fall easily to the side of a poor man against a rich man, or corporation. The necessity of vindicating the law and protecting society is not strong enough to secure the infliction of just penalties upon the guilty when the jury permit themselves to consider the anguish and suffering that will be brought upon innocent relatives and friends. This is likewise more creditable to goodness of heart and human sympathy, than to sound judgment and common sense. But gallantry is commendable, and kindness of heart and sympathy with those in trouble and affliction are human attributes which we would not want to dispense with, even if they do result occasionally in the miscarriage of justice.

But there are many other considerations that have weight with jurymen—the Law and the evidence of course have a little, but previous individual experiences and personal peculiarities and tendencies probably have as much, if not more, to do with the making of verdicts.

In a case where a young man sued the street car company for damages because he had been licked by the conductor, one of the jurors, we will call Smith, happened to be just fresh from a commission to assess damages and award benefits for the condemnation of a piece of real estate. The evidence showed that the young man had been somewhat fresh and officious in his conduct, but not enough so to justify the assault and really serious beating that he received. He was a young man of good standing in the community, and the chastisement having taken place in a street car, more or less filled with people, he and his attorneys looked forward to a substantial verdict to compensate him for the mortification and humiliation sustained, as well as for the personal injuries inflicted. But he bore himself during the trial somewhat as he had in the street car, with an "I own the earth" air; and to the surprise of everyone who heard the evidence the jury brought in a verdict in his favor for the paltry sum of twenty-five dollars. It was afterward learned that the entire jury were of the opinion

that the young man's damages should be assessed at a thousand dollars; but Smith, while acquiescing in this amount, succeeded in convincing the other eleven men that it was their duty also to assess benefits, and that the licking was worth to the young man, at that critical period in his life, at least nine-hundred and seventy-five dollars. Leaving a balance of twenty-five dollars to his credit, for which they rendered verdict.

Jurors also have a very human way of doing what they suppose to be justice, regardless of the court's instructions as to the law. There is a story current of a jury which was practically instructed by the court to find for the defendant; that the plaintiff had failed to make a case. They did not do so, however, but remained out all night, and the bailiff reported them in the morning as unable to agree, and asking to be discharged. The court was astonished. He had the jury brought in, and repeated his instructions and, thinking some obstinate fellow must be holding out against the court and the other eleven, he added a lecture on the duty of jurors to make reasonable concessions, etc., and stated further that there was no reason for a disagreement in the present case, and he hoped they would return shortly with a verdict. As the jurors were filing out of the court room, the last man turned, and addressed the court, said, "I am the only one with you, Judge; shall I give in?"

But litigants are the most interesting study. There is perhaps no situation in life that illustrates so well the effect of interest on the operation of the mental faculties. How quick men are to comprehend what makes to their advantage. How obtuse in catching on to what is going to benefit the other fellow. The closest and nicest distinctions in law and precedent are readily grasped by the layman when drawn by court or counsel to sustain a decision in his favor. Broad and fundamental principles of law and equity are entirely beyond his ken when quoted to sustain the position of his antagonist. If, in exceptional instances, he does realize the justice of the principle quoted against him, he utterly falls down in the attempt to apply it adversely to himself in the case at issue. A rul-

ing of the court on a demurrer is the most frequent occasion for the exhibition of these mental peculiarities.

Counsel for defendant, who have, perhaps, succeeded in having the plaintiff demurred out of court, because of the insufficiency of the complaint to state a cause of action, have no difficulty in making their client understand how it was done. Nothing so easy. In fact no course of procedure could be more natural and logical to his mind; he knew the plaintiff had no case all along; it was an outrage that he should be forced to retain counsel and leave his business and come to court at all; but then, he reasons, it is one of the results of allowing everybody to sue without giving bond for costs; he knew all the time the court would dismiss the whole proceeding as soon as he got a chance at it; he has been unnecessarily subjected to trouble, inconvenience and expense, but the court has vindicated him as far as it was in the court's power, and he is not disposed to kick. But how is it on the other side? The plaintiff is completely at loss to understand how his case was thrown out of court, defeated for the time, without a trial, without the examination of a witness, without his even being permitted to tell the story of his grievance, or wrong. I imagine there is no duty falling upon an attorney that requires more tact and skill than the explanation of such an occurrence to his client. While it is not so in fact, owing to the difficulty I have just referred to of making the layman understand nice distinctions in law, when they operate against his side of the dispute, the attorney is frequently driven into a position where he must either confess that he did not know how to draw a good complaint, or assert that the court did not know a good complaint when he read it. I am violating no confidence when I say that in such cases the latter position is the one usually assumed. When the plaintiff comes back with an amended complaint that the court holds good, it is the defendant's turn to be puzzled and mystified. He is not surprised that the plaintiff has been able to amend his complaint so as to make a good case on paper. That simply required a willingness on his part to allege

whatever was necessary, writing material, and knowledge of what was requisite. Willingness to allege anything whatever he concedes to the plaintiff in the largest degree. Pen and paper are easily obtained, and the court furnished the necessary knowledge when he sustained the demurrer to the original complaint; so the fact of the amended complaint is accounted for. What surprises the defendant and causes him to lose faith in courts of justice, and public institutions generally, is the fact that the plaintiff is permitted to amend. He knows the facts in dispute have not changed since the filing of the original complaint; of course the plaintiff stated his case as he believed it to be in that complaint, and the court saw there was nothing in it; and now when the court knows there is nothing in the charge and allegations, the plaintiff having failed on the best presentation of the case that he could make before being educated by the argument and ruling on the demurrer, he is to be permitted to try again, and see if his counsel cannot make up, manufacture a case, and the thing is to go on indefinitely, and he, the defendant, is to keep dancing attendance upon court to the destruction of his peace of mind and the material detriment of his business affairs. Is this what courts are organized for, he asks himself; is this the justice that every man is guaranteed under the constitution of his state, "freely and without purchase, completely and without denial, speedily and without delay?" The obtuseness is on the side of the defendant now. It is all clear enough to the plaintiff. There is nothing in the proceeding, as the plaintiff views it, that would even suggest inquiry. It is all exactly right. When the case is put at issue and the trial begins, he has settled down to the feeling that the judge was, maybe, a little cranky at first, but he has wobbled around all right; and this feeling lasts until he takes the stand and is not permitted to tell the things he has been going over with his counsel and friends and in his mind, when there was nobody to listen, in anticipation of this very occasion. Then he finds that the judge has got cranky again; that counsel on the other side is unfair, captious, unreasonable,

even, perhaps a greater rogue than his unprincipled client. It goes on so to the end, the judge away up in the estimation of the plaintiff, a second Daniel come to judgment, and correspondingly low in the estimation of the defendant; and then high up in the opinion of the defendant and below par with the plaintiff; not that they impugn the court's honesty of purpose and good intentions—although sometimes they do that—but generally they think the court simply fails to grasp the situation, does not understand their side, is deceived as to the other; and quite frequently there is the feeling that the reason the court does not understand, or in case of adverse verdict the reason the jury did not understand, is because the party was not allowed to tell his story in his own way, but was interrupted and restricted to fragmentary statements by opposing counsel, who were sustained in their exasperating conduct or by a misguided court. And it not unfrequently happens that the defeated party's own counsel is held responsible for bad results, because, having a better appreciation of the possibilities of cross examination on the subject his client wants to enter upon, or the opportunities its introduction would give the opposite party or rebuttal, he has interrupted and started his client off on another line, or, as he sometimes has to do, forbidden his making the statement he thinks would be especially effective. If the finding is in his favor he readily comes to the conclusion that his lawyer knew best; but if the finding is the other way he is quite likely to think that his own attorney understood the case little better than the lawyer on the other side and the court, and he is liable to be possessed ever after with the idea that he was defrauded of his rights by gross malpractice on the part of his counsel.

Most men and women make their only appearance in court as witnesses, and in this capacity human nature presents many phases that are both interesting and amusing. With the ordinary types most everyone is familiar. There is the dull witness who does not know his own handwriting, the confident witness who knows it all, the partisan witness who cannot wait for questions, the deaf wit-

ness whose mishearing causes comical and often startling answers; the irrelevant witness whose memory for details and incompetent conversations is only exceeded by flow of words and inability to remember anything important, and the interesting witness, generally a prepossessing young lady, whose becoming costume, demure behavior, downcast eyes, blushing cheek, and faltering but sweetly modulated voice makes sleepy jurors give attention, and warns most skillful cross-examiners to beware.

The key to many of the idiosyncrasies exhibited on the witness stand may be found in the fact that very few witnesses, whose testimony is of real importance in the matter at issue, take the stand without more or less bias. They are dominated by a desire to accomplish some result beyond the mere recital of such facts as are within their knowledge.

There is quite a large class of people who are utterly and absolutely unable to discriminate between what they recollect and the conclusions they have reached by reasoning from the facts they think they know. Many who could make the distinction consider it unnecessary to do so. This is particularly the case with men engaged in the management of large business enterprises. Such a man is in the habit, in his own affairs, of relying upon his memory for little and upon his actual knowledge of the conditions with which he is to deal much less. He acts in matters of the highest importance upon reports which come to him from subordinates, whose business it is to supply him with accurate information, and upon his deductions from the facts reported to him. If he has a clear recollection that a certain transaction was thus and so, and also a memorandum, or book entry, even though made by someone else, he would look up the memorandum before acting upon his memory, and if his memory and the memorandum were at variance he would, without hesitation, consider memory at fault and govern himself by the writing. It is quite natural that he should not take kindly to the rule of evidence that the written memorandum is nothing, and he must testify from recollection or not testify at all; and that the very memoran-

dum which he made or had made, in order that he might not have to rely upon his memory, has no standing in court unless he can say that he has a present recollection of the matters therein set down. And so with his books of account. All business men consider their books better than the best memory. Some consider them next to the bible in point of infallibility, and many revere them even more. When on the witness stand he wants to give the court the best he has. Is it any wonder that he is surprised, and cannot understand, when informed that the very thing that would, in his way of thinking, settle the whole controversy, cannot be received as evidence on his side of the dispute at all? And he is more likely to be impressed with the wisdom of the law when he learns, as he is likely to do very shortly, that the entries on the book which were inadmissible to sustain his contention, when he desired to introduce them, became competent evidence in the hand of his opponent, and may be used to defeat him? If he were a disinterested spectator it could readily be explained, and he would readily understand, that to permit him to introduce in his own behalf entries of his own making, would be to permit him to manufacture evidence in his own behalf; and that it is entirely proper to permit their use against him because it may safely be presumed that entries against his interest would not be found in his book unless they told the truth. But as he is not a disinterested spectator, the whole proceeding strikes him as contrary to common sense and fair play, and contrary to the rules of conduct governing prudent men in all the affairs of life; and he thinks the laws of evidence admirably adapted to keep out the facts, and that truth must indeed be mighty if it prevail under such circumstances.

It might be remarked in passing that the rule requiring a witness to swear that a memorandum so refreshes his memory that he has a present recollection of the matters referred to in it, before the memorandum becomes competent, has a worse effect than simply to perplex witnesses. The less conscientious witness has no hesitation at all in swearing

that his recollection is so refreshed by the memorandum that he now independently recollects the fact; and thus secures the admission and consideration of evidence that would be otherwise incompetent. The conscientious witness will not do this but will state, what is the fact nine cases out of ten, that while he knows the matter contained in the memorandum to be true, he has no present recollection of it; and he is therefore deprived of the benefit of such evidence. In other words, the rule operates to disqualify the conscientious witness, and admit the testimony of those who are willing to stretch a point to make the evidence competent. Courts, however, are in the habit of construing this rule as liberally as possible, in order to avoid this difficulty; but when the point is clearly made they are obliged to sustain it.

But as I was saying the business man regards knowledge derived from reliable sources better than any man's recollection; he is in the habit of forming conclusions and acting on them in matters of a great deal more importance, perhaps, than the one occupying the attention of the court, and he does not take kindly to the information which comes to him quickly and often in no very agreeable manner, from counsel or from court, that his conclusions are not wanted. It is passing strange to most witnesses of this class that the court must go to the trouble of forming its own conclusion, rather than accept the very excellent ones they have to offer ready made.

Then again, there are those exceedingly conscientious witnesses who from former experience have mastered these nice distinctions that the law makes, and are overwhelmed by them. Going to the other extreme, they believe they cannot state anything that is not a matter of such positive recollection as to preclude the possibility of error. As there is very little anybody recollects with this degree of certainty, counsel are driven to desperation in the effort to get out of them facts known to be within their knowledge. When a statement is wrung from such a witness by most vigorous and ingenious questioning, he at once proceeds to qualify it with other state-

ments as to how it might have been otherwise, until there is nothing left in the shape of reasonably positive affirmative testimony; and the party who calls him is in despair, and his attorney is ready to engage in a wordy warfare with anybody, on any pretext.

Another frequent cause of misunderstanding, embarrassment and bad feeling between witnesses and counsel is the fact that counsel want a categorical answer, and the witness, without the slightest intention to evade, answers, using an idiom, or form of expression which in ordinary intercourse would be considered and accepted as such, but which, strictly speaking is not. For instance, the question is put on cross-examination, "Did you say so and so to George Jones at the Union depot?" The witness, only desiring to make an emphatic denial, replies, "Well, I rather guess not." It may be important to have the witness deny or admit, without qualification, and the examining attorney does not want an answer in the record that, in the reading of it, is nothing more than a qualified guess; so he repeats the question. The witness replies with a little irritation, "What would I say that for?" This is unsatisfactory and the question is put again, this time with a little heat on the part of the examiner, and the witness replies with more impatience, "That he should think he didn't say anything of the kind." For obvious reasons this answer also falls short of what is wanted, being little better than the first, and the question is again repeated and perhaps is answered, "Of course I wouldn't say that." This reply is objectionable as the result of reasoning and not recollection, and the question is put with more vehemence of manner a fifth time. The witness is now convinced that counsel is trying to annoy and bully him, to get him rattled and then entrap him in some unfair manner, and he becomes angry and suspicious and is on his guard against giving a direct and explicit answer to any question whatsoever. He says that he has already answered that question two or three times, and counsel, convinced that the witness is purposely evading, repeats the question with some uncomplimentary comment. The witness takes the continued repetition of the question

as a reflection on his intelligence, as an effort to belittle him and discredit him in the estimation of the court and jury. Of course from this time on counsel and witness are hopelessly apart and at cross purposes. The witness, however fair-minded he may have been at first; resolutely refuses to say what he imagines counsel, for some dark purposes, wants him to say, as long as he can possibly avoid it; and counsel are more than ever determined to accept nothing but complete categorical answers. Tempers do not improve under these circumstances. It is a very short time until both appeal to the court, the witness for protection, and counsel that the court will instruct the witness that it is his duty to answer questions. The court seldom does either. Experience has taught him a better way. He turns in his easy chair towards the witness, and in the voice of ordinary conversation repeats the question over which counsel and witness have got so at loggerheads, and the witness naturally, without particular purpose to do so, answers it directly and completely. The examiner starts in again with a clear field, but the state of feeling is such that misunderstandings are easy now, and mutual admiration is not the dominant sentiment when the ordeal is over.

It is wonderful how a question by the court straightens things out. The reason is simple. The court's question receives better attention than question of counsel, and the mind of the witness is more receptive; not being suspicious of the court he gets the point of the question and answers without thought as to where it leads.

Before any cross-examination has gone very far the witness has ordinarily become more or less biased and partisan. If he has no direct interest in the litigation, or in the parties to it, he becomes partisan by attempting to sustain his position against the assaults of the enemy—the cross-examining attorney—and so instead of giving his best attention to the question put, his mental faculties are much more actively engaged in the effort to figure out the purpose of the question, where it reaches, what the questioner is driving at; he always credits the cross examiner with ulterior

motives and deep designs, and in the effort to fathom them he unintentionally loses the point of the question, and his answer is farther from meeting it than he intends or realizes. This happens often when the question is clear and explicit. Of course many questions have not these characteristics, but on the contrary are involved, obscure and ambiguous. Often a concise question can be construed in two or three different ways; in which case the witness takes it the way it was not meant. Then it is a great deal more difficult than most people appreciate to frame questions that are not objectionable as leading and suggestive which will call out the facts wanted. A recent graduate from the law school may raise objections and wrangle over law questions like a veteran, but his inexperience is painfully evident in the examinations of his own witnesses. The witness, not being familiar with the rule forbidding leading questions, frequently supposes it is something else wanted, rather than the matter he has talked over with counsel, simply because the question does not go direct to that point. And so he gropes around answering as to a lot of things that are irrelevant until his temper is ruffled by interruptions and objections. Many attorneys do not take the trouble to frame their questions as carefully and clearly as they could. Others think it is necessary to keep things moving to make question follow question rapidly, in order that the witness may not be given time to think; losing sight of the fact that this course also deprives him of a like opportunity. More cautious and painstaking lawyers put bungling questions because their mind is intent on facts that they want to bring out without opening the door for the bringing out of other undesirable facts on cross or reexamination, rather than on the wording of their own questions. Their attention is also to a considerable extent upon the effect that a possible answer this way or that, may have upon the case in general. These facts are sufficient to make misunderstandings not only easy but probable; but in addition, the effect of the application of many of the rules of evidence upon men fresh from stores, offices and shops is, to say the least of it,

confusing. They neither understand the rules nor the reason of them: many of them seem to be indirectly contradictory. No sooner has the layman, on his first appearance in court, mastered the general proposition that he must not testify to anything he has heard anybody else say, but must confine himself strictly to matters within his absolute personal knowledge, that he is asked if he is acquainted with somebody's reputation for truth and veracity, for instance, and is told that reputation is made up of what people say of a man, and it is on his knowledge of what people say that he must answer; that his own knowledge in the premises is in the highest degree improper; and for the infraction of no other rule is a witness sat down upon so hard. That he must first answer affirmatively that he is acquainted with such reputation before he can give his opinion as to whether it is good or bad would not seem to be an unreasonable requirement nor one difficult to comprehend, but, taken with the other feature of the question it seems to make the situation a hopeless one for the average witness. He is coached by the attorney who called him, lectured by the attorney who did not call him, and admonished by the court, until he does not know where he is, or what is wanted of him; and in many instances all efforts to enlighten only add to his confusion and embarrassment. "I don't know what you fellows are driving at, or what you want me to answer anyhow," was the despairing cry of one witness in this situation.

Harper's Drawer gives the following account of an Irish witness wrestling with the character and reputation question. He is asked by counsel, "Do you know Mr. O'Flaherty's character for morality?"

"Excuse me, yer Anner, but would yez moind sayin' thot question over agin?"

"Is he a man of good moral character?"

"O' im not after understhandin' yer Anner."

Then the court asks impatiently, "Is he a good man?"

"Good man, is it? Shure he is thot.

Its mesilf has seen him thumping the faces aff two Orangemen to waunst."

Some witnesses, however, do get the distinction through their heads, and are even capable of refining on it. A defendant railroad company was endeavoring to prove the bad reputation of the plaintiff, a saloon keeper, and a man with whom every business transaction was likely to result in a personal encounter or a law suit; who was persuasive with his fists, and untiring and pertinacious as a litigant. These qualities did not make him popular but they commanded for him a certain quality of respect, and people who were compelled by force of circumstances to differ with him did so as deferentially and respectfully as they could. When they were sure of their company they failed to observe this mildness in expressing their opinion of his personalty and his doings. A witness was called and asked if he "was acquainted with the general reputation of the plaintiff for morality in the neighborhood where he resided and among those with whom he associated, making up that opinion from what people said about him, and the way they received him." The witness started to answer in an indirect way, and counsel on both sides were on their feet in an instant, the one objecting, and the other explaining that that particular question must be answered yes or no, that he did or did not know the reputation, before he could proceed further. The court quieted counsel and entered upon an elaborate explanation of the question, that it did not call for the personal knowledge of the witness, etc., that he must make up his answer from what people say about the plaintiff and the way he is received by his neighbors. "That is just it, Judge," exclaimed the witness, "that is just the difficulty; you have got two elements in that question; I can't answer it that way; if you go by the way people treat him he is the nicest man in the county; if you go by what they say about him, he is the worse man outside the penitentiary.

The answer satisfied all parties.

A great deal of not exactly false, but at least loose swearing, is due to unwillingness in everyone, more or less, to retreat from a position once taken. It is

hard for men to give up, acknowledge themselves wrong, or accept a suggested modification of even an unimportant statement to which they have, probably without thought, committed themselves. Indeed, the less important the matter, the more likely is this trait to manifest itself, because in important matters, conscience will keep it within bounds; I know one witness who persistently maintained, in spite of the efforts of counsel to correct him, that on the 24th day of February, 1895, it was 110° below zero in West Indianapolis. It is often the case that the more intelligent the witness, the more reluctant he is to retreat or take back anything, and the more inclined he is, if he said the horse was sixteen feet high, to stick to it. This is the peculiar failing of the class called expert witnesses. On direct examination they may be fair and candid. They believe the conclusion they have reached is correct. It is a short step then to the position that the conclusion being correct, it should be maintained. All the more so because he believes the attorney on the other side, crammed for the purpose by other experts, is going to resort to every means, fair or unfair, catch questions and tricks, to drive him from it in discomfiture and disgrace. Hence, they come to regard the cross examination as a sort of intellectual contest, a tournament of wit, in which he and the experts on his side joust with the attorneys and experts on the other, rather than in an effort to get at the truth.

The extent of the recognized information of the cross-examining attorney has as much to do with the quality of their answers as the limitations of their own knowledge. When they are sure they have him in deep water they are not at all particular about getting over head themselves; they talk of matters of which they know little or nothing as positively as of matters with which they are entirely familiar. A physician of this city, distinguished for his all-around intellectual capacity, broad common sense and fairness, as well as for skill in his profession, was called to testify as an expert microscopist in a case where forgery was charged. The document in controversy was partly printed and partly written.

The question was whether the written characters were over the printed, or the printed characters over the writing. If the written matter was over the printing it was as it should be. If the printing was over the writing, it would raise a strong presumption against the regularity of the document. The cross examination drifted off into the mechanical process of printing, about which the doctor knew less than most people. But no one would have discovered it from his manner of testifying. He described minutely how the impression was made on a printing press, by type placed in a frame that came down on the paper spread out on a stationary plane or flat surface, to receive it, and what the peculiarities of an impressison made in such manner would be, discoursing upon their presence, or absence in the document. Evidently his idea of a printing press was based on somebody's notary public seal or date stamp. However, the attorney cross-examining seemed to have no more correct ideas of printing processes than the doctor, and the examination passed on to some other point. Shortly afterwards I happened to meet the doctor, with whom I am proud to claim some degree of personal friendship. "Well," he greeted me, "don't you think I got away with the old judge?" referring thus familiarly to the eminent counsel who had cross-examined him. "That is what is the matter with expert witnesses," I replied: "You are more intent upon getting away with the man who is cross-examining you than upon telling the truth." "Now what do you mean by that?" he asked. "Well," I said, "you testify as explicitly about things I am pretty sure you don't know anything about as you do about things I believe you know all about." "I do not understand you," he said. "Well," I explained, "you don't know anything about printing; yet you testified as to how that printing was done with as much certainty and definiteness as you did anything else." "Why do you say I don't know anything about printing?" "Because," I replied, "there never was such a printing press as you described." "I will show you one," he said. I expressed my willingness to look at it whenever he found one. Some days afterward I met him

and he said, "I haven't found that printing press; I guess I was a little off on that;" but the old judge didn't know any better, anyhow."

Most attempts on the part of a witness to be funny result disastrously, and the best lose in the telling. In fact the judge is the only person in court who can attempt a joke with absolute safety. A joke depends for its success as much upon circumstances as upon its own merits. If the time is inopportune, or the hearers not in the humor, the most brilliant witticism falls flat, or worse, recoils upon the head of the unfortunate perpetrator. In court the time is most always inopportune. Spectators are generally in sympathy with a witness as against the attorney, but any expression of sympathy on their part is promptly suppressed. The immediate friends of the joker show their appreciation as much as they dare, but his own counsel frown upon such levity, and counsel on the other side refuse even to recognize the fact that a joke has been attempted, but treat the unfortunate sally as they would any serious answer from the witness box, and proceed with most inhuman cruelty and torturing deliberation to dissect and analyze and question its accuracy as a statement of fact. Our own best jokes would shrink and wither under such a frost, and the crude attempts of others could not be expected to survive. Occasionally, however, a reply is so apt, the hit so clean, that everybody is surprised into recognizing its merit, if they do not show their appreciation. Of course the thing must be spontaneous. If a witness has to spar for an opening for his joke, its failure is sure and complete. Success is due almost entirely to the fact that it comes unexpectedly, and from an unlooked-for quarter. Some time ago a quiet-mannered old gentleman was sued by an attorney with whom in former years he had sustained very friendly relations. Thinking to get a certificate of character from his opponent, the attorney asked him if he, the attorney, had not done certain commendable things at that time. The old gentleman cheerfully admitted that it was so. Then turning to the jury he stated in a natural, matter of fact way, but with the slightest twinkle in his eye, "Sam wasn't a lawyer then."

In another case counsel had taken the deposition of a man named Jones, whose attendance he was unable to secure owing to the fact that he was doing time in the penitentiary at Michigan City. In order to pave the way for the introduction of the deposition, it was necessary to show that the deponent was then beyond the reach of the process of the court. Having a witness on the stand by whom he thought he could prove this fact, he asked him if he knew where Jones was. The witness replied that he did not. Somebody interested in the case volunteered the information that Jones was dead. "If you know he is dead, I know where he is," promptly replied the man in the box.

But while the wit of the witness stand is not generally of a high order, being most frequently an attempt to get back at counsel, in which the witness is often personal and often rude—not knowing that in court nobody can be rude but counsel—proceedings are often enlivened with expressions of native shrewdness and originality on the part of witnesses. A year or so ago the younger children of a family came to fear that the oldest brother was in one way and another going to get all their father's property, and that there would be nothing to divide among them at his death. To prevent such a catastrophe they filed a petition to have the old gentleman declared of unsound mind, and a guardian appointed to take charge of his property and business. The old gentleman began at once to make preparation for an energetic defense. He retained good lawyers, consulted medical experts and subpoenaed men with whom he had had business transactions, who could testify that he was abundantly able to take care of himself in trade and dicker. In consulting physicians he happened to call upon one to whom had already been submitted a statement of the case as prepared by the younger children, in which all his sayings and doings, supposed to indicate mental failure, were set out at length, and upon which statement the physician was expected to come to the conclusion desired by the petitioners. The statement was of course *ex parte*, and enough to raise doubt, at least, as to his mental sound-

ness. The physician was glad to avail himself of the opportunity to study the case personally, and encouraged his visitor to talk, but was guarded in what he himself said. He gave substantially the following account of the interview later, on the witness stand.

"It was not long until I saw that Mr. S. had noticed that I was not committing myself, and it was evident that he was disappointed. He did not go away at once, however, but remained talking quite sensibly, and at some length on different subjects. Finally he got up to go, and though the talk had done something to weaken the impression made on my mind by the statement I had been studying, I still thought it better not to express an opinion. He stopped in the doorway with his hand on the knob, and abruptly asked me if I had ever heard the prayer offered by one of Gen. Washington's soldiers before the battle of Trenton. I said I had not. 'Well,' he said, 'before the battle Gen. Washington asked the soldiers to pray for victory. One soldier who was not in the habit of praying, but to whom an order from the Commander-in-Chief was an order, no matter what it related to, went a little apart from his comrades, and getting down on his knees, delivered himself in this wise:

"'Be with us to-morrow, Oh Lord; be on our side if you can; but, Oh Lord, if you cannot be on our side, just hold off altogether, and you will see the goddarndest fight that ever took place in these parts.'"

It is hardly necessary to say that the doctor was able to make the application, and when the day of battle came he was on the old gentleman's side, and so were the jury, who were captured by his shrewdness and wit on the witness stand as completely as the doctor had been.

Heavy and stupid witnesses sometimes surprise the court with almost poetic metaphor, apt illustration, just and striking comparisons. I remember an instance where one of two claimants to a farm in possession of a tenant was testifying as to a demand he had made upon the tenant for rent. The other claimant was also demanding the rent. "What did he say to your demand?" was the question. "Well," answered the wit-

ness, "he didn't say nothing; I knew, just how he was fixed, he was just like a man holding up two big stones that was leaning in on him; if he gave in to either, 'tother was going to fall on him." This same witness created a good deal of entertainment by the quaintness of his replies to other questions. The rental value of the house on the farm was a question in issue. He seemed unable to get at it readily and his attorney undertook to help him, or at least to get data from him by which the rental value might be arrived at, and asked what kind of a house it was. The witness's mind did not work rapidly, and the attorney again came to his aid with the suggestion, "that it was a large house with a hall in center and a front door opening into the hall." "Well," said the witness, finding words at last, "You see the front door to that house is in the behind side of the house." Of course this statement caused an audible smile. The witness looked from counsel to the jury, and from the jury to the court, and then to the spectators. It was evident he did not see any cause for merriment. Surprise was first depicted on his countenance, then a puzzled expression, then annoyance, and he burst out, the words coming easily enough now: "Well, it is just as I tell you, when they built the house the roads was so they couldn't get to the front of it unless they went around it, so they put the front door in the behind side." Everybody laughed again, but the witness lost nothing in the estimation of the jury by his answer, and his own seriousness was never disturbed for a moment. On cross-examination, as bearing on one phase of the case, counsel wanted to show that he and his family, and his brother with his family, all lived with the old folks? "You all ate at a common table?" was the question. Again there was hesitation, again the same puzzled expression spread over his face, and finally came the frank announcement, "Well, yes, it was a common table, we didn't put on no style out there."

There was in this witness the touch of nature that makes all the world akin, and from the time he took his seat the logic and eloquence of counsel opposed to him availed nothing.

The verdict was made, and the next time he went to collect rept from the farm the tenant no longer feared the other big stone.

## SUPREME COURT OF OHIO.

### Official Record of Proceedings.

FRIDAY, May 21, 1897.

#### Motion Docket.

2935. The Merchants' Banking & Storage Co. v. George Zipperle. Motion by plaintiff for an order staying proceedings in cause No. 5567, on the general docket. Motion overruled on authority of *Neubert v. Phillips*, 46 Ohio St., 559.

2936. The State of Ohio *ex rel.* Edward Keyser v. P. S. Blosser *et al.*, Commissioners. Motion by plaintiff to advance cause, No. 5517, on the general docket. Motion allowed, cause advanced and briefs to be filed within rule.

2937. Leo. A. Brigel v. E. W. Kittredge *et al.* Motion by plaintiff to reinstate cause No. 4771, on the general docket. Motion overruled.

2938. Leo. A. Brigel v. E. W. Kittredge *et al.* Motion by plaintiff to reinstate cause No. 4772, on the general docket. Motion overruled.

2939. Lydia Hadlow *et al.* v. William H. Beaves, *ex'r.* Motion by plaintiff for stay of proceedings in cause No. 5532, on the general docket. Motion allowed and bond fixed at \$1,000, with sureties to be approved by the clerk of the court of common pleas of Cuyahoga county.

2940. The Second National Bank of Bucyrus v. William Moderwell *et al.* Motion by plaintiff for extension of time to file printed record in cause No. 5511, on the general docket. Motion allowed and time extended to November 1, 1897.

2941. The State of Ohio *ex rel.* Bachman v. Edwin Wright. Motion by plaintiff to advance cause No. 5572, on the general docket. Motion allowed, cause advanced and assigned for oral argument on June 10, 1897.

Causes to and including No. 4773, on the General Docket are called and marked submitted. The next call will be to and including No. 4889.

TUESDAY, June 8, 1897.

#### General Docket.

4581. Benjamin Kingsborough v. William V. Tousley. Error to the circuit court of Cuyahoga county.

#### WILLIAMS, J.

1. In an action on a personal judgment, whether rendered by a court of this state or elsewhere, it is competent to plead and prove in defense, though it be in contradiction of the record, that the defendant was not served with

process, nor jurisdiction of his person otherwise obtained by the court rendering the judgment.

2. Such a defense is not within the rule which forbids the collateral impeachment of judgments but it is in the nature of a direct attack upon the judgment.

3. An answer, in such case, is not defective because it fails to state a defense to the cause of action on which the judgment is founded.

Judgment reversed.

5378. Philip Baker v. Druzilla Rice. Error to the circuit court of Knox county.

MINSHALL, J.

Where one who is the owner of a body of land, during his occupancy of it, constructs a private way over one part of it to another as a means of egress and ingress to the latter from his home and also to the public highway, which way is apparent, continually used, and reasonably necessary to the use and enjoyment of the land to which the way is constructed, and, also, adds materially to its value, conveys by deeds of the same date, the part with the way to it to one of his children and the part with the way over it to another one of them, each takes his part to be enjoyed with reference to the way as the same existed at the time of the division—the one with an implied grant of the way to it, and the other subject to such way as an easement therein.

Judgment affirmed.

4509. William Meredith v. J. A. Franks et al. Error to the circuit court of Licking county.

MINSHALL, J.

1. Where an owner of a tract of land has made and maintained a private way over his land to a public highway, and such way is his only means of ingress and egress to his home, sells and conveys to another a portion of it, lying on the public highway, and is thereby deprived of all access to the highway, except by the way he had previously constructed and maintained and which passes through the granted part, and the facts were well understood by both parties at the time, in such case, the way is reserved to the lands of the grantor by implication, although the deed contains a covenant against incumbrances.

2. It is a general rule that one cannot derogate from his grant; so that to warrant the inference of a way reserved by implication, it must be one of strict necessity to the remaining lands of the grantor; it is not merely a matter of convenience, and if the grantor has another mode of access to his land, however inconvenient, he cannot claim a way by implication in the lands conveyed, though he may have been in the use of a way over it to a public highway at and a long time before the conveyance, and of which the grantee had notice at the time.

Judgment affirmed.

4644. The Allemania Loan & Building Company v. Jacob Frantzreb et al. Error to the circuit court of Hamilton county.

SHAUCK, J.

A vendor of real estate who retains the legal title as security for the payment of the purchase money may, by subsequent oral contracts with the purchaser, annex further conditions to his obligations to convey; and they will be enforced in equity against a mortgagee of the purchaser who acquires his interest after such further conditions have been annexed and while the legal title remains in the vendor.

Judgment reversed and judgment for plaintiff in error.

4587. The Cambria Iron Company v. Robert W. Keynes et al. Error to the circuit court of Hocking county.

BRADBURY, J.

1. In construing a contract of guaranty, the object should be to ascertain the intention of the parties; and as in construing all contracts, the words employed by the parties should be construed in the light afforded by the circumstances surrounding the parties at the time it was made.

2. Where the financial condition of a corporation for profit located in this state requires its credit to be strengthened, and for this purpose all or part of its directors execute, in this state, a guaranty in the following terms:

"Logan, Ohio, September 21, 1891.

"We the undersigned directors of the Motherwell Iron & Steel Company of Lagan, Ohio, do hereby guarantee the ultimate payment of all material purchased of the Cambria Iron Company of Johnstown, Pa., for the use of said Company during the season of 1891 and 1892. R. W. Keynes, S. M. Bright, I. N. Collins, D. M. Motherwell, M. D. Moore, B. R. Higgins, L. A. Culver," and authorize such guaranty to be forwarded to a manufacturing concern in Pennsylvania to be used by the latter as a basis for extending credit to the former company, such instrument should be construed to authorize the giving of a reasonable period of credit to the purchasing company, although such reasonable period should be for a longer time than had been customary in the previous course of its business.

3. A sale of goods, made to the principal under such guaranty, upon four months time, with a privilege to the purchaser of sixty days additional time by paying six per cent. interest, and taking therefor a negotiable promissory note running for six months, is not giving an unreasonable term of credit to the principal, although the prior dealings of the parties had been upon four months credit.

Judgment reversed, and judgment for plaintiff in error upon the facts found by the court of common pleas.

4665. United States Mutual Accident Association v. Keith M. Hubbell. Error to the circuit court of Hamilton county.

SPEAR, J.

1. Death caused by accidental drowning is death "through external, violent and accidental means," within the meaning of the stipulation of an accident policy which gives indemnity against death by such means.

2. The term voluntary exposure to unnecessary danger," in an accident policy, does not embrace every exposure of the assured that might have been avoided by the exercise of due care on his part. It relates to dangers of a substantial character of which the assured at the time had knowledge, and to which he purposely and consciously exposed himself, intending at the time to assume all the risks.

3. And where a traveling salesman who holds an accident policy issued to him as such salesman, is confronted, while in pursuit of his business, with possible danger because of a slough in a public road on his regular line of travel, over which he has passed twice a year for thirteen years, and makes inquiry of other men living in the vicinity as to the existence of danger at the time, and receives opinions, some expressing fears of danger and others to the contrary, and acting on his own judgment, formed from such opinions and from his previous knowledge, and from appearances at the time, in good faith concludes that there is no danger to his life in crossing, and attempts to cross, and is accidentally drowned, such attempt is not a "voluntary exposure to unnecessary danger" within the meaning of the policy.

Judgment affirmed.

4635. Frederica Ham v. Charles F. Kunzi. Error to the circuit court of Franklin county.

BURKET, C. J.

A right of action accrued to H, a married woman, before section 4968, Revised Statutes, was amended March 26, 1883, so as to remove her disabilities as to rights of action concerning her separate property: *Held*, that her rights must be determined by the statute of limitations in force at the time her right of action accrued, and that the removal of her disabilities by said amendment did not have the effect to cause the statute of limitations to begin to run against her.

Judgment reversed.

4850. The Eureka Heating & Ventilating Co. v. The Neracher & Hill Sprinkler Co. Error to the circuit court of Hamilton county. Application for rehearing not entertained.

4516. The State of Ohio ex rel. Attorney-General v. The Aetna Fire Association, of Cincinnati, O. In *quo warranto*. Dismissed by plaintiff.

4596. Charles Hollinger et al. v. Jacob Knoblock. Error to the circuit court of Stark county. Judgment affirmed.

4632. Michael Griffin v. Edward Higgins et al. Error to the circuit court of Logan county. Judgment affirmed.

4634. The Tuscarawas Electric Co. v. Lemuel R. Aumond. Error to the circuit court of Tuscarawas county. Judgment affirmed.

4648. The Village of New Lisbon v. Ralph Elliott. Error to the circuit court of Columbiana county. Judgment affirmed. Shauck and Minshall, JJ., dissent.

4660. Benjamin Kingsborough v. William V. Tousley et al. Error to the circuit court of Cuyahoga county. Judgment affirmed.

4683. John P. Seiberling v. The Tuscarawas Coal & Iron Co. et al. Error to the circuit court of Summit county. Judgment affirmed.

4684. James P. Douglass v. Elam A. Blangher. Error to the circuit court of Madison county. Judgment affirmed.

4699. William Ogden et al. v. Sarah Jane Darby. Error to the circuit court of Hardin county. Judgment affirmed.

4701. Elizabeth P. Jordan, Adm'x, et al. v. John L. McCammon. Error to the circuit court of Hamilton county. Judgment of the circuit court reversed, and the judgment of the superior court of Cincinnati affirmed.

4866. John Hagerty, Auditor, et al. v. Mary A. Britt. Error to the circuit court of Hamilton county. Judgment affirmed on grounds stated in Britt v. Hagerty, 11. O. C. C. Rep., 115.

5230. State of Ohio ex rel. J. M. Wheller v. W. D. Guilbert, Auditor. In mandamus. Demurrer to answer of defendant overruled and judgment for defendant.

5288. Bradford Shinkle v. The Industrial Building & Loan Association. Error to the circuit court of Hancock county. Dismissed by plaintiff in error at his costs, by leave of the court.

5340. The Cincinnati, Hamilton & Dayton Railroad Co. v. Ella Hickey, Adm'x. Error to the circuit court of Lawrence county. Judgment affirmed.

5389. The State of Ohio ex rel. Attorney-General v. The Cleveland, Ohio, Mutual Live Stock Insurance Association. Quo warranto. Judgment of ouster.

5411. The State of Ohio ex rel. W. D. Guilbert, Auditor of State, v. W. H. Halliday, Auditor of Franklin county. In mandamus. Dismissed by the attorney-general without record.

5520. The City of Cincinnati and D. W. Brown, Auditor, v. The Board of Education of School District of Cincinnati. Error to the circuit court of Hamilton county. Judgment affirmed.

#### Motion Docket.

2942. The P. & L. E. R. Co. v. Catherine Cousins. Motion by plaintiff to dispense with reproducing photographs in printed record in cause No. 5578, on the general docket. Motion allowed.

2943. The Incorporated Village of Salineville, O., v. Mary S. Qualey. Motion by defendant to advance cause No. 5559, on the general docket. Motion allowed, cause advanced and briefs to be filed within rule.

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A. T. Holcomb, of Portsmouth, and Frank B. Finney, formerly of Cincinnati, have formed a partnership for the general practice of the law at Portsmouth, Ohio, under the firm name of Holcomb & Finney.

Bushrod Kelch, the Cleveland wife murderer pleaded guilty to murder in the second degree, last Saturday and was sentenced to life imprisonment. At a previous term he was convicted of murder in the first degree but was granted a new trial by the supreme court.

Walter L. Granger, of Cincinnati, and Heber Kenaga, of Urbana, were admitted to practice in the United States circuit court on the recommendation of Miller Outcault, C. B. Matthews and C. B. Prior, of Cincinnati.

Wm. Y. Stubbs and Oscar Kerchenberger, of Greenville, Ohio, were admitted to practice in the same court on the recommendations of H. D. Peck, John E. Bruce and Charles T. Greve.

Judge Milton L. Clark, one of the best jurists in Ohio, died at his home in Chillicothe, last Friday afternoon. He had been ailing for some time, but death resulted principally from the infirmities of old age. He was born in Ross county, April 21, 1817, and was 80 years old at the time of his death.

He served two terms as prosecutor in Ross county, and in 1849 was elected to the Ohio legislature. He was also elected as the Republican candidate to the constitutional convention in 1873, and was a delegate to the national Republican convention in 1860, which nominated Lincoln. In 1884 he was elected circuit judge in the fourth judicial district, and six years later was re-elected.

**RIGHT TO LATERAL SUPPORT.**

In the case of *Hall v. Kleiman*, decided by Judge Hollister of the Hamilton common pleas court, April 10, it appeared that the plaintiff and defendant were the owners of adjoining lots abutting upon an improved street. The elevation of the front parts of the lots was about two feet above the curb, and the natural surface of the lots was such that at the rear of the lots the elevation was twenty five or thirty feet above the curb line of the street. The defendant excavated a part of his lot for the purpose of building and making an area way about his home to the level with the curb. It does not appear that the excavation was made negligently, yet the ground was of such a nature that a large part of plaintiff's soil fell into the excavation. Plaintiff claimed damages for the injury to his lot growing out of the removal of its lateral support. At common law the right of lateral support is incident to the land and an action lies for injury to the land caused by the removal of such support, and the right to damages exists without proof of negligence.

In the decision filed by Judge Hollister the contention of counsel that this rule has been changed by the statutes of Ohio was held to be good. After a consideration of these statutes, sections 8223—84, 2676 as amended; 2677 with the repeal of 2677 and the amendment substituted March 1, 1894, and relying upon the *Steinkamp* case, 54 O. S., 284 and the language of the circuit court in the recent waterworks case, of *Ampt v. The City of Cincinnati*, the supreme court having accepted the reason therein expressed. Judge Hollister holds that section 8223—84 is a general law both in subject matter and in the reason underlying its proper application, and that it is therefore in conflict with section 26, article 2 of the constitution, in that it gives rights and privileges and grants immunities to citizens in certain localities where are found the same condition which gives reason for the application of the law to the favored localities. This section being void, sections 2676 and 2677 as amended embody the law on the subject, and the conclusion must be that in every city or village the owner in possession of a lot may, with impunity, in the absence of

negligence, grade the surface of his lot to make it conform to the established grade of the street,

We have the decision in full and will publish it in a subsequent issue of the NEWS.

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**ORDINANCE TO LICENCE OUTSIDE  
PRODUCE DEALERS.**

An opinion of general importance to villages and municipal corporations in general was rendered by director of law S. N. Owen, of Columbus, Wednesday of last week. The question presented to the director of law was as to the legality of an ordinance requiring dealers who sell produce, poultry, garden truck, etc., in carload lots or less, except farmers and gardeners residing in the country adjacent to the city, to take out an annual license. The opinion of the director of law is as follows:

"To the Judiciary Committee of the City Council:

"GENTLEMEN: Concerning the proposed ordinance, No. 12,551, submitted to this department for an opinion upon its legality, I have to say:

"The power given by subdivision 40 of section 1692 of the Revised Statutes is to license and regulate the sale of produce and other merchandise from canal boats, vessels, cars on railroad tracks and from railroad depots.

"The power does not seem to extend to the prohibition or regulation of sales 'in any warehouse.'

"The object seems to be to regulate sales from canal boats, from vessels, from cars and from railroad depots. Sales from warehouses apart from depots do not seem to be within the power of regulation by council.

"Then I suggest it is as well and better not to attempt a specific enumeration of the different kinds of produce, etc., to be affected by the ordinance.

"If the council shall ordain that no person shall sell or offer for sale, barter or exchange 'any produce or other merchandise,' etc., the scope of the prohibition or regulation would be as broad as the power which authorizes city legislation upon the subject, while as it is, it

may be found that some kinds of produce or merchandise are not provided for. In that case it does not seem necessary to recite 'any carload lot or any less quantity.' I suggest as a form for section one down to and including the words 'within the corporate limits of the city,' etc., the following:

"No person shall sell or offer for sale, barter or exchange any produce or other merchandise from any canal boat, from any vessel, from any car on a railroad track, or from any railroad depot within the corporate limits of the city of Columbus without,' etc. Then proceed with the language already adopted. The ensuing portion of the section in which this change is suggested requires all dealers falling within its provisions to take out a license of \$200 before they may legally transact business.

"Whether the license fee is so excessive as to amount to a prohibition and for that reason to affect the validity of the ordinance is a question upon which I express no opinion, for the reason that it is impossible to anticipate how that subject might impress the courts.

"I have included canal boats and vessels because sales may be made from them within the city. With the above qualifications and changes I think the ordinance proposed would be legal. Respectfully submitted.

"SELWYN N. OWEN,  
"Director of Law."

#### THE STATE FISHING LAWS.

A decision of much importance to the state was handed down last Monday, in the United States district court, by Judge Sage. Judge Sage upholds the Ohio fishing laws and this in the face of the recent decision made by Judge Ong, in the Cuyahoga common pleas court, in which he held that a certain statute was unconstitutional, because it provided for the confiscation of private property without due process of law.

The case decided was that of *Crangle & Co. v. The Steam Tug W. G. Harrow, and Alexander McClennan, master*. The plaintiff asks damages in the United States court for the seizure of the nets,

and the tug was libeled for the amount asked. Judge Sage dismissed the case, declaring that the libelants could not recover damages. For a number of years it has been a question as to how far out in the lake the state has jurisdiction. This question was settled as follows:

"The nets which were seized were not set in the high seas, although they were more than a marine league from the shore. The northern boundary of the state of Ohio is fixed by the act of congress of June 5, 1836. The boundary line between the United States and the British dominions in North America was settled and defined by the treaty with Great Britain, August 9, 1842. So far as it has any bearing upon this case it is, 'along the middle of Lake Erie,' which is also the northern boundary line of the state of Ohio.

"It is the settled law of this country that the ownership of, and dominion and sovereignty over lands covered by fresh water in the great lakes belong to the respective states within which they are found. It follows that each state has exclusive control of fisheries in the waters of the great lakes within its limits."

As to the rights of the state to protect its fisheries, the court said:

"It is within the power of a state to preserve from extinction fisheries in waters within its jurisdiction, by prohibiting exhaustive methods of fishing, or use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish. \* \* \* A provision in the statutes of a state that nets set or maintained in waters of the state, in violation of the statutes of the state enacted for the protection of fish, may be summarily destroyed by any person, and that it shall be the duty of certain officers to abate, remove, and forthwith destroy them, and that no action for damages shall lie or be maintained against any person for or on account of such seizure or destruction, is a lawful exercise of the police power of the state, and does not deprive the citizen of his property without due process of law, in violation of the provision of the constitution of the United States."

In quoting from the supreme court of New York, the court added:

"The supreme court said that the cost of condemnation by judicial proceedings would largely exceed the value of the lots, and in many cases would tend to defeat the execution of the law. The object of the law, the court remarked, was a beneficial one, and the state ought not to be hampered in its enforcement by the application of constitutional provisions intended for the protection of substantial rights of property.

"The court added: 'It is evident that the efficacy of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried before a court or magistrate, notice of the seizure to be given by publication, and regular judicial proceedings to be instituted for its condemnation.'"

Judge Sage dismissed the libel.

#### PREScriptive RIGHTS.

A somewhat startling proposition in the law of easements is laid down in the case of *Whittenton Manufacturing Co. v. Staples*, 41 N. E. Rep., 441, (Mass.), Field, C. J., Holmes and Lathrop, JJ., dissenting. It is to the effect that in consequence of payment by owners of land for more than twenty years of an annual sum of money toward the repair of a dam situated off the premises, the land thereby becomes subject to a servitude to pay that sum annually. The decision is based on the analogy of the duty to repair a dam to the duty to repair fences and highways.

The primary conception of an easement is a right to use another's land; It is a burden imposed upon the land itself, and gives the owner of the easement a right *in rem*. The duty of the owner of the servient estate is the same as that of all other members of the community, merely to refrain from interfering with the use of the easement. Unfortunately, the law has allowed a landowner to acquire by prescription, or by grant, certain rights which are not accurately rights in the land of another compelling a passive duty of noninterference merely, but are rights compelling posi-

tive acts by the *dominus* of the servient estate.

In these cases the land is not subjected to use, but the owner, by reason of holding the land is compelled to do positive acts. A right to compel the performance of positive acts is known as a spurious easement; and up to this time has been strictly confined to three classes of cases. The law has recognized the right to compel the repair of fences; repairs in connection with the enjoyment of an existing easement, and repairs to be made upon the highway by abutting owners. It is doubtful if the last mentioned right was ever recognized in the United States previously to the decision in the recent case of *Middlefield v. Knitting Co.*, 160 Mass., 267. The question in the principal case concerns the extension of these exceptional easements.

There are two strong objections: In the first place, the analogy between repairs on a dam situated on the land of a stranger and repairs to fences and highways is not complete. In each of the spurious easements noted above, acts are to be done on the servient estate. But, aside from this imperfect analogy, the creation of rights in the nature of easements, varying widely, however, from the primary conception of easements, that of a subjection of the land itself—has gone far enough. It is to be regretted that such rights—anomalies at best—were ever allowed to creep into the law; and on principle they ought not to be extended beyond their present well-defined limits.

It is conceivable perhaps that strong reasons of public policy would justify the extension which the court tries to make in the above mentioned case; but Field, C. J., in his dissenting opinion, forcibly replies to arguments of this nature that "secret liens of interest in lands, a knowledge of which cannot be obtained by a view of the land itself, or by a search in the proper registry of deeds, ought not to be extended." With authority and reasons of public policy against the decisions, it has little left to support it.

The Massachusetts court would certainly support a covenant to pay this money, even though in so doing it would

probably go beyond the doctrine of *Savage v. Mason*, reported in 3 Cush., 500. There the covenant was to pay for the privilege of using a party wall, and was connected, it would seem, with the enjoyment of an easement, in this case a right to retain the wall on land of the covenantor and his assigns.

#### ADMITTED TO THE BAR.

The entire graduating class of the Western Reserve Law School, of Cleveland, passed the bar examination last week Thursday and were sworn in by the supreme court at Columbus, the following day. The class is as follows:

John Mordecai Anderson, Philadelphia, Pa.

Julius Herbert Anthony, Cleveland.

Frederick C. Becker, Lima.

Henry Clark Crowell, Glenville.

Ernest Albert Feazel, Lodi.

Charles Nevin Fiscus, Massillon.

Richard Hillard Gaylord, Cleveland.

William Franklin Kees, Cleveland.

James Clark Mansfield, Bloomingdale.

Vergne Corlett Leslie, Cleveland.

Walter Moore McMahon, Cleveland.

Clarence Roy Megerth, Cleveland.

Frazo D. Miller, Columbiana.

Michael Schaaf, Berea.

The entire thirty members of the graduating class of the law department of the Ohio State University, passed the bar examination. The members of the class were sworn in by the supreme court as follows:

O. W. Agler, Wilmot.

G. E. Bibbell, Apple Grove.

James W. Blake, Canton.

George W. Bope, Pleasantville.

M. L. Boyd, Columbus.

H. F. Brand, Columbus.

H. Delano Butler, Adelphi.

C. E. Ellis, Columbus.

Frank H. Foster, Sidney.

W. T. Genheimer, Portsmouth.

Charles T. Herbert, Columbus.

Charles H. Hower, Akron.

C. H. Huston, Mansfield.

Benner Jones, Jackson.

Roy E. Layton, Wapakoneta.

George E. Luce, Columbus.

Edward M. Peese, Oak Harbor.

Gilbert Manecke, Fostoria.

George C. Miller, Lancaster.

Samuel G. Osborn, Columbus.

Archer L. Phelps, Warren.

Edwin S. Randolph, Somerset.

Ralph R. Rule, Green Spring.

Lowney F. Sater, Sater.

Robert T. Shank, Hamilton.

Walter S. Snyder, Columbus.

F. M. Stevens, Elyria.

Theodore Weyant, Columbus.

Wm. C. Wiesman, Port Clinton.

Hiram S. Bronson, Columbus.

Out of ninety candidates who recently took the bar examination at Columbus only thirty-eight passed. Following are the successful candidates.

Guy C. Baker, Greenville.

Clarence R. Bissell, Cleveland.

W. C. Carman, Youngstown.

John A. Cline, Warren.

Clement V. Collins, Springfield.

John H. Costello, Cincinnati.

Nathan G. Cover, Delaware.

Edward L. Cox, Belpre.

Oliver L. Cunningham, Mansfield.

Emanuel P. Elrich, Marysville.

William F. Fouse, Akron.

Thomas J. Green, Shelby.

A. R. Horr, Cleveland.

Orla E. Harrison, Greenville.

William L. Hart, Inverness.

Harvey H. H. Hubbell, Wooster.

Albert A. Huseman, Cincinnati.

Parke S. Johnson, Cincinnati.

J. E. Kelley, Bowling Green.

Chas. F. Lang, Cleveland.

Carl W. Lenz, Dayton.

William Y. Mahar, Springfield.

Alexander H. Martin, Cleveland.

Charles M. Milroy, Bellefontaine.

Adolph I. Newman, Cleveland.

William E. Patterson, Bethesda.

William Pohlman, Dayton.

John S. Pratt, Toledo.

E. C. Ryan, New Cumberland.

B. W. Rowland, Freeport.

Harry L. Snyder, Akron.

Edson D. Stout, Circleville.

Bernard A. Unverferth, Glandorf.

Frank V. Whiting, Cleveland.

Brand Whitlock, Toledo.

Rollin A. Wilbur, Cleveland.

Roy H. Williams, Sandusky.

Frank W. Woods, Risley.

**A NEW LAW FIRM.**

An important change took place recently in one of the leading law firms of the Erie county bar. It was the retirement of W. B. Starbird from the firm of Wickham, Guerin & Starbird of Sandusky. C. O. French of St. Joseph, Missouri, purchased the interest of Mr. Starbird in the firm for a substantial consideration, and the firm will now be known as Wickham, Guerin & French.

Mr. French comes to the bar of Erie county highly recommended. He is a former Ohioan, coming to this state with his parents when a young man and locating at McArthur. He graduated from the Ohio University at Athens, and was afterwards admitted to the bar, and then located at Fort Scott, Kansas, where he began the practice of law in partnership with W. E. Guerin, Sr., president of the C., S. & H. Railway, and the father of W. E. Guerin, Jr., one of his present associates. He served as judge of the sixth judicial district of Kansas for nine years and resigned that position two years before the expiration of his term to accept the position of general counsel for a large western railroad at Salt Lake City. Judge French has made his home the past two years at St. Joseph, Missouri, where he practiced law and attended to outside interests.

A letter written by Justice David J. Brewer of the supreme court of the United States, in speaking of Judge French, says:

"It gives me pleasure to state that I have been well acquainted with ex-Judge Cyrus O. French for a score of years and more. For a portion of that time, seven or eight years, he was judge of the district court for the Sixth judicial district of Kansas. Prior to that time he had been one of the registers in bankruptcy for the district of Kansas. His record as district judge was one of the best. His district, while not of the largest, contained the important city of Fort Scott, and in his court was a variety of important and complicated litigation, which was disposed of by him with accuracy, promptness and to the satisfaction of the profession and the community.

"Prior to his appointment to the bench he was engaged in active practice at the

city of Fort Scott, and was among the most successful members of the bar.

"He is a good lawyer, industrious, prompt, thoroughly reliable, and a gentleman. I therefore, cheerfully recommend him to any who need the services of a competent counsel.

**'DAVID J. BREWER.'**

Of the other members of the firm little need be said. Judge C. P. Wickham of Norwalk, is an old and prominent practitioner at the Huron and Erie county bars. Mr. Guerin though a young man, has since his location in Sandusky demonstrated himself to be an attorney of much ability and stands to-day as one of the best lawyers at the Erie county bar. He is a graduate of the law department of Cornell University. There is no doubt but that the partnership as it now stands is one of the strongest law firms in this section of Ohio.

This firm is the outgrowth of the partnership of E. B. King and Linn W. Hull. Upon the elevation of Mr. King to the circuit bench, the firm then became known as Hull & Guerin, and upon Mr. Hull's election to the common pleas judgeship, another change took place, and on January 15, of this year, the firm of Wickham, Guerin & Starbird was organized.

Mr. Starbird will practice law alone. He is one of the leading attorneys of the Erie county bar. He was admitted to the bar in 1882, and opened an office in Milan, where he met with much success in the practice of law. He located in Sandusky in 1891 and entered into partnership with Judge Grayson Mills, which partnership was continued with much success until last January when he entered the firm in which he has just disposed of his interest.

**STREET RAILROADS.**

Judge FERRIS of the Hamilton probate court, recently announced his decision in the matter of the application of the Main Street Electric Road of Cincinnati, for authority to condemn certain rights of way through the streets of Cincinnati. It will be remembered that the injunction granted by Judge Smith, of the superior court, reported in 6 Dec., 81,

was for the purpose of enabling the Main street company to make satisfactory arrangements with the municipal boards looking to the obtaining of a franchise. The limit of time granted by Judge SMITH, was six months, and during this period the company has been actively engaged in an ineffectual endeavor to secure through the board of legislation as well as through the board of administration the necessary consents. The ordinance that was introduced in the board of legislation, was referred to a committee, and after a full discussion in the board, sitting as a committee of the whole, was indefinitely postponed, and a motion to reconsider was lost. It was then that an appeal was taken to the courts and a petition filed in the probate court, praying for authority to appropriate the streets or so much of them as might be necessary to the use of the Main Street Company for its tracks, in the operating of a street railroad. The petition also asked that the court through the intervention of a jury, should ascertain the measure of damages, fix the tenure and determine what amount should be paid for the privilege sought.

The case occupied many days in hearing, and, as the facts were substantially agreed upon, the questions passed upon by the court were largely those of law.

The court found from the evidence, that the charter defining the rights of the company limited the organization to the construction and operation of a railroad between a point in the city of Cincinnati and one in the village of Avondale, and that such charter, granted under the law in force in May, 1852, and subsequently amended by the act of April, 1877, referred to a steam railroad or commercial railroad, and by the provisions of the law expressly excluded all reference to a street railroad.

The court held that by the adjudications had both in the federal and state courts upon the charter rights of the plaintiff company, there was no escape from the conclusion that the Main Street Electric Railroad Company was operating a street passenger railroad under a charter which gave no such authority; that an extension of a steam railroad might be had under the provisions of the

law, as a steam railroad, where the power of appropriation would lie, but that a steam railroad could not be extended as a street railroad any more than a street railroad could be extended as a steam railroad; that in law there was a plain distinction everywhere manifest in the decisions between a railroad—referring to steam railroads—and a street railroad; that while the power of appropriation of franchises that would carry with it the right to the use and occupancy of the street, could, under section 3283, Revised Statutes, be found relating to railroads, there was nowhere in the statute any authority for the appropriation of property rights by a street railroad for street railway purposes, and, therefore, it followed that there could be no authority for the extension or construction of a steam railroad under the guise of a street railway. The statutes pointed out the manner in which street railways could obtain their franchises, giving them the right to the use, occupation and enjoyment of streets through an application made under law to the municipal boards.

The court held that under the law as it now exists, the control and the regulation of the streets, alleys and highways of the city of Cincinnati were in the municipal boards; the revenue derived for the use of the streets was by law the exclusive property of the city, and the right to define and determine the mode of the use of the streets, as well as the conditions under which they should be used, was an exclusive privilege given by the statute to municipal authorities. Such rights are not, in the purview of the law, to be fixed by proceedings in condemnation or appropriation. The court held that the policy of the law was to view such powers as were sought to be invoked in this proceeding strictly and that in the event of any doubt such doubt should be resolved against the grant.

After citing a long list of authorities in support of these propositions, the court denied the application and dismissed the petition.

The action on the part of Judge FERRIS now leaves the final conclusion of the matter with the supreme court, where the case was argued and submitted on an appeal from a decision of Judge HUNT of the superior court.

## SUPREME COURT OF OHIO.

## OFFICIAL RECORD OF PROCEEDINGS.

COLUMBUS, O., June 15, 1897.

## General Docket

4643. W. H. Lasley, Administrator, etc., v. The Pomeroy National Bank et al. Error to the circuit court of Meigs county. Judgment affirmed.

4655. The New York, Chicago & St. Louis Railway Co. v. C. J. Chaffee. Error to the circuit court of Cuyahoga county. Judgment affirmed.

4664. Colon Schott on behalf, etc., v. The City of Cincinnati et al. Error to the superior court of Cincinnati. Judgment affirmed.

4677. R. S. Mason v. John M. Lemmon et al. Error to the circuit court of Ottawa county. Judgment affirmed.

4714. The Cincinnati, Hamilton & Dayton Railroad Co. v. The Cincinnati Street Railway Co. Error to the circuit court of Hamilton county. Judgment affirmed on the grounds stated in the report of this case in 32 W. L. B., 4.

4846. Henry Korb et al., Commissioners, v. The State of Ohio ex rel. James E. Collins et al., trustees, etc. Error to the circuit court of Hamilton county. Judgment reversed and petition dismissed on authority of *Burson v. Hixson*, 54 O. S. 470; *State ex rel. v. Commissioners*, 54 O. S. 333.

5474. Charles D. Campbell, Auditor, v. The State of Ohio ex rel. Error to the circuit court of Logan county. Judgment affirmed. Bradbury, Spear and Minshall, JJ., dissent.

## Motion Docket.

2044. The City of Cincinnati et al. v. W. S. Sterrett, Assignee, et al. Motion by plaintiff to advance cause No. 5555, on the general docket. Motion allowed. Cause advanced, and briefs to be filed within rule.

2045. Edwin Brown v. Alatheia Carey Whaley et al. Motion by defendant for leave to file cross petition in cause No. 4903, on the general docket. Motion overruled.

2946. The State of Ohio v. J. Bohm. Motion by defendant for oral argument in cause No. 5448, on the general docket. Motion allowed.

2947. Jacob H. Silverthorne et al. v. Joseph Parsons et al. Motion by plaintiff for temporary injunction in cause No. 5595, on general docket. Motion allowed; bond fixed at \$500, with sureties to be approved by the clerk of the circuit court of Cuyahoga county.

2948. R. B. Brooks, Treasurer, v. H. Van Nes. Motion by defendant to advance cause No. 5418, on the general docket. Motion allowed, cause advanced, and briefs to be filed within rule.

## New Cases.

New cases filed in the supreme court since May 12, 1897:

5564. Adam Foulk et al. v. Emanuel J. Howenstein, admr. Error to the circuit court of Logan county. James F. Wilson, S. G. West, W. H. West, J. E. West and George W. Emerson for plaintiffs. William Lawrence and Howenstein, Huston & Miller for defendant.

5565. The Cincinnati Street Ry. Co. v. The Cincinnati Inclined Plane Ry. Co. Error to the superior court of Cincinnati. E. W. Kirtledge, J. W. Warrington and Foraker, Prior & Foraker for plaintiff. Miller Outcalt and C. B. Matthews for defendant.

5566. C. L. Dalrymple, admr. v. William Wyker, admr. Error to the circuit court of Morrow county. John A. Garver for plaintiff. Harlem & Wood for defendant.

5567. The Merchants' Banking & Storage Co. v. George Zipperle. Error to the circuit court of Cuyahoga county. Kline, Carr, Tolles & Goff for plaintiff. Hamilton, Hamilton & Smith for defendant.

5568. Elizabeth Gaskill v. Sarah A. Watts et al. Error to the circuit court of Mercer county. John H. Koenig for plaintiff. Marsh & Loree for defendants.

5569. Adam W. Poe v. Flora A. Dixon. Error to the circuit court of Cuyahoga county. Burke & Ingersolls for plaintiff. Dickey, Brewer & McGowen for defendant.

5588. Edward K. Stewart v. A. J. Dyer et al. Error to the circuit court of Madison county. R. H. McCloud and Watson, Burr & Livesay, for plaintiff. Wilson & Smith, for defendants.

5589. Frank Ratterman, County Treasurer, v. Sarah M. Phipps et al. Error to the circuit court of Hamilton county. Rendigs, Foraker & Densmore, and L. W. Goss and William L. Avery, for plaintiff. William Worthington and J. W. Warrington, for defendants.

5590. Thomas W. McCue v. Thomas F. Smith. Error to the circuit court of Tuscarawas county. J. A. Braddy, for plaintiff.

5591. L. P. Smith et al. v. Peter Gorman an infant, etc. Error to the circuit court of Cuyahoga county. Goulder & Holding for plaintiffs. Wilcox & Fruid, for defendant.

5592. John Hippel v. William L. Darling et al. Error to the circuit court of Jackson county. J. W. Binnon and T. A. Jones, for plaintiff. Tripp & Eubanks, for defendants.

5593. Jeanetta Hughes Hunter Rathburn v. William A. Hunter. Error to the circuit court of Sandusky county. J. H. Rhodes and Garver & Garver, for plaintiff. Richards & Heffner, for defendant.

5594. Oscar W. Kneisley v. Oscar F. Davidson, Trustee. Error to the circuit court of Montgomery county. R. M. Nevin, for plaintiff.

5595. Jacob H. Silvertown et al. v. Joseph Parsons et al. Error to the circuit court of Cuyahoga county. Burket & Ingersolls and Squire, Sanders & Dempsey, for plaintiffs.

5596. The Tuscarawas Electric Co. v. John C. Donahy, Admr. Error to the circuit court of Tuscarawas county. A. W. Patrick and Neeley & Patrick, or plaintiff. Richards & McCullough, for defendant.

5597. James Farmer v. The Findlay Street Ry. Co. Error to the circuit court of Hancock county. Jason Blackford & Byal, for plaintiff. J. A. & E. V. Bope, for defendant.

5598. The B. & O. R. R. Co. et al. v. The City of Bellaire. Error to the circuit court of Belmont county. J. H. Collins, for plaintiff. Hunter S. Armstrong, for defendant.

# Ohio Legal News.

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*The growth of this paper during 1896 has been so marked that we confidently assert that it now has a greater circulation than any other Ohio law paper. It also contains so much more legal matter that we are justified in claiming it to be the leading paper in its class.*

## OHIO STATE REPORTS.

Volume 54, Ohio State Reports, is now ready for delivery, and may be obtained at \$1.50 per volume, payable in advance.

Arthur E. Georgi, of the Cincinnati bar, was admitted to practice in the United States circuit and district courts, on the recommendation of James N. Ramsey, Harlan Cleveland and John E. Bruce, members of the Cincinnati bar.

Assistant Secretary Davis, of the interior department, has rendered a decision that will affect many claims for pensions. He reversed the action of the pension office in the case of Catharine Geronzine, a widow of a soldier in the Ohio infantry, which rejected the claim for pension because there was no proof of the death of the soldier. Geronzine left home in July, 1866, since which time nothing had been heard from him. The assistant secretary holds that further inquiry should be made concerning the man and if nothing is thereby developed throwing additional light on the case, death may be presumed under the act of March 13, 1896, making seven years' absence from home, without intelligence of his existence, a presumption of death.

The Springfield mayoralty muddle reached the attorney general's office last Friday. In accordance with the provisions of the Garfield "anti-corrupt practices act," E. M. Calhoun, of Springfield, filed an affidavit with Attorney General Monnett, charging that Mayor Good, expended more than is allowed under the Garfield act, both to secure his nomination and election.

Calhoun represents the labor unions of Springfield, which organization is behind the prosecution. Accordingly the attorney general instructed prosecutor Horace W. Stafford, of Clark county, to begin action within ten days to try Mayor Good's title to the office.

It is understood that the constitutionality of the act will be tested before the case is settled.

Hon. Edward Wiatt, one of the most prominent members of the Summit county bar, will, with the close of the present month, retire from active work, after having rounded out his 75th year of life and 53d year of active legal practice. On the first day of July, the lawyers of Akron and vicinity will tender Mr. Wiatt, a complimentary banquet.

An interesting case was recently decided by the Hamilton circuit court. It was the case of *Ella Wohlgemuth et al. v. The Standard Drug Co.*, which involved the question as to the priority of about thirty-four notes, each becoming due at a different time and the payment of all of which was secured by the same chattel mortgage. The evidence incorporated in the bill of exceptions did not show when any of the notes were assigned by the payee and mortgagee to any of the persons now holding them. All may have been assigned at the same moment, or those maturing last may have been assigned first. But in either event, in the absence of any contract between the holders and the assignor as to the order of payment, the rule found in *Anderson v. Sharp*, 44 O. S., 260, 268, would apply, and the notes would be entitled to payment in the order of their maturity. No such contract was proved in this case, and the decree of the court below was in accordance with the above rule.

It was urged that there was error below in the refusal to admit the testimony of the mortgagee and payee of the notes and of other persons to prove that on the day the mortgage was executed, it was agreed between the mortgagor and mortgagee that the notes were to be paid equally and rateable out of the mortgaged property. Was this evidence incompetent as tending to vary and contradict the terms of the written contract (the chattel mortgage) in question?

In a written opinion by Judge SMITH, a majority of the reviewing court held that if the alleged parol agreement was made before the execution and delivery of the written contract (as to which the evidence is silent), the proposed testimony would have been incompetent; and if made after execution and deliver-

ing of the notes and mortgage, it still could not affect the present holders of the notes by assignment, for it does not appear whether the assignment was before or after the agreement.

Judge SWING thought that the evidence was competent and was of the opinion that under the principles announced in *Kernohan v. Manss*, 53 O. S., 119, that the refusal to receive the evidence was not prejudicial to the plaintiffs in error.

#### HUSBAND AND WIFE.

[Lucas Common Pleas Court.]

EDWARD QUIGLEY V. MICHAEL H. MURPHY.

#### CHARGE TO THE JURY.

[Delivered by Judge Pratt.]

*Gentlemen of the Jury:* The plaintiff in this case, Edward Quigley, brings this action against the defendant, Michael H. Murphy, and seeks to recover from said defendant, the father of two children, alleged in the petition to be of the ages respectively one of ten years in August, 1894, and the other of seven years in February, 1894, for the board, nursing, care, clothing and medicines which he claims that he furnished to the defendant's said children during a period of two hundred and twenty weeks, between the thirty-first day of December, 1889, and the first day of May, 1894; and plaintiff asks for judgment against the defendant for the sum of \$2,200 and interest from May 1, 1894. The petition in which plaintiff sets forth his claim alleges that Claudia Q. Murphy is the wife of the defendant Murphy, and the mother of the children in question. That on or about December 31, 1889, the defendant and his said wife entered into an agreement, by the terms of which they were to live separate and apart, but neither to forfeit any rights as regards their children, and that such children should have their home with the plaintiff and his wife. It is also alleged that the defendant agreed that the plaintiff should be paid \$5.00 a week for their board. The petition also alleges that

the defendant entirely neglected and failed to furnish the necessities of life—the necessary clothing, care, nursing or medicines, for these children, and that by and with the authority of the defendant's wife—Claudia Q. Murphy—acting for and on behalf of her husband, he did during two hundred and twenty weeks supply the said children with their board and other necessities of life, to wit: care, clothing and medicines, and he alleges the value of the boarding, clothing and medicines to be \$10.00 per week.

The defendant files his answer to the petition—which is designated as the second amended petition in the case—and the one on which the claim now under consideration is being tried, and he answers it denying each and every allegation in the petition except as to certain matters which he admits; and it is proper that I should call your attention to the matters which he admits in his answer, because whatever is admitted by one party or the other you take as being conceded by him, and therefore not necessarily in issue. After this general denial, the admissions that he makes are as follows: that he is the father of the two children in question, and that Claudia Q. Murphy is the wife of the defendant. He further admits that on or about the 31st day of December, 1889, the said defendant entered into an agreement with his wife, Claudia Q. Murphy, under and by the terms of which they were to live separate and apart, and that said contract in no way changed the rights of either of said parents as to their said children; and he further admits that it was further contracted by the terms of said agreement that the children should temporarily, and for no fixed or stated time, have their home with the plaintiff and his wife, Eliza Quigley.

He further says that after the making of said agreement between the defendant and his said wife, Claudia Q. Murphy, and on or about the 1st of January, 1890, this defendant left his children with the plaintiff, who agreed to board them for the sum of \$20.00 per month. That under and in pursuance of said agreement between plaintiff and said defendant, said children remained with the plaintiff for a little over two months, until on or

about the 5th day of March, 1890, and then he alleges that, "On or about the 5th day of March, 1890, this defendant, with the full knowledge, acquiescence and consent of the said Claudia Q. Murphy, placed his children in the Ursuline Convent of the Sacred Heart in the city of Toledo, Ohio, and arranged for their remaining in said convent permanently; that said convent is a Catholic institution, and that said defendant and his wife are both members of said church; that at said convent said children were well and properly cared for and educated; that said convent was in every respect a proper place for said children."

Then he further alleges that some time afterward, to-wit, on or about April 2, 1890, the plaintiff and the said Claudia Q. Murphy, acting in conjunction with said plaintiff and in no wise thereunto authorized by the defendant, unlawfully, fraudulently, and by deception practiced upon the Mother Superior and other inmates of said convent, and without the knowledge or consent of said defendant, took the said children from said convent, and defendant says that whatever, if any, nursing, care, clothing and medicine, or either, that said plaintiff furnished said children from said time, have been furnished voluntarily and without the knowledge or consent of this defendant, and without any agreement or contract with him or on his part, actual or implied. Then he further alleges that he has been always ready, able and willing to furnish the necessities of life for said children, and to furnish them proper nursing, care, clothing, medicine and instruction, and has never neglected in any way his said children.

To this answer plaintiff files a reply, and in that reply he first admits that on or about the 5th day of March, 1890, the defendant took his said children from the residence of the plaintiff, where they were being boarded and cared for by him as set forth in the petition, to the Ursuline Convent. And now comes the denial: "But plaintiff says that the defendant took said children to said convent without the acquiescence or consent of his wife, Claudia Q. Murphy." Plaintiff admits that said convent is a Catholic institution—and now comes the denial again: "Plaintiff says that he has

no knowledge, and therefore denies, that said convent was a proper place for children of such tender years." Then, in reference to the allegation made in the answer as to the taking of these children from the convent, after that, he says: "That afterwards, to-wit, on or about April 2, 1890, the wife of defendant, said Claudia Q. Murphy, upon going to said convent to visit said children, found them very much depressed in spirits, sick and discontented, and said Claudia Q. Murphy, fearing for their health and believing that if they were kept away from the home such as she and her parents could furnish, the said children were likely to fade away and die, she did, of her own free will and accord, take said children from said convent, and took them back to the residence of plaintiff, where, at the request of said Claudia Q. Murphy, and under the express and implied promises of the defendant, this plaintiff, did board, nurse, clothe and otherwise care for said children as set forth in the petition.

"And plaintiff further says that it is not true, and he therefore denies that he ever acted in conjunction with said Claudia Q. Murphy in removing said children from said convent, or had anything to do whatever with said removal; but, on the contrary, the plaintiff had no knowledge of their being taken away until they were brought to his home by said Claudia Q. Murphy."

And further, by way of denial, he says that he denies that said children were unlawfully, fraudulently or by deception of any kind taken from said convent. "He further denies that the nursing, care, clothing and other necessities furnished by plaintiff to said children were furnished without the knowledge or consent of defendant and without any agreement or contract with him, actual or implied; but, on the contrary, this plaintiff says that the defendant had full knowledge of said children being taken by said wife from the convent to the home of this plaintiff, and that they were being nursed, clothed and cared for as stated in the petition. And plaintiff says that the defendant frequently visited said children at his said home, making no objection whatever to their maintenance there, and otherwise ratified the action of his said wife in leaving the said children in the

custody of the plaintiff. By reason whereof this plaintiff says that the defendant impliedly promised and agreed with plaintiff to pay him a reasonable and proper compensation for the said care and necessities furnished to the said children, and is estopped from asserting that he did not so promise and bind himself therefor."

"Further answering, this plaintiff says that it is not true, and he denies that the defendant has been ready and willing (although amply able) to furnish the necessities of life for the said children, or furnish them with proper nursing, clothing, care, medicines and instruction; but, upon the contrary, defendant has failed, neglected and refused to supply said children with any necessities of life, or otherwise cared for them. And plaintiff says that the defendant ever since the separation from his said wife has neglected in every way to fulfill his duty as a father towards his said children."

Now the allegations made in the petition and denied by the answer, are in issue. The affirmative allegations made in the answer, charging anything upon the plaintiff, and that are denied in the reply, are in issue. The denials in the reply of course make the issues to that extent so far as there are affirmative allegations in the reply; that is, making any charges or claims as against the defendant; there is no necessity for any further pleadings in reference to those, but those you will take as being denied.

And, gentlemen, this case is now to be submitted to you to determine the issues so made in these pleadings filed by the parties, upon the evidence which has been produced before you, and which the court has admitted as evidence in the case, and under the rules of law which I will give you to govern you in your investigations.

There are certain instruments in writing which have been introduced in evidence, and it is my province and duty to give you a construction of these written instruments. Under and by the articles of agreement between Mr. and Mrs. Murphy, dated December 31, 1889, both the father and mother agreed thereafter to live separate and apart, but both the father and the mother reserved to themselves and to each of

them, all their rights and privileges as parents, except and subject to the following qualifications: *First*, That the said children were to have their home for the then present with the plaintiff in this case and his wife. *Second*, The children were never to be permitted to live with or have home with a step-parent. That is, either with the future wife of the father or the future husband of the wife, if either should ever thereafter again marry. *Third*, The mother agreed not to remove the children from the care of Mr. and Mrs. Quigley without the consent of the father.

Under this agreement, gentlemen, the father, so far as the children in this case was concerned, had the right to remove the children from the care of the plaintiff and his wife at any time thereafter, when he chose to do so, without the consent of the mother, or of the plaintiff or his wife. As the duties of the father after having removed them, I will instruct you further on.

The other written paper in evidence is the agreement signed by the plaintiff—Quigley—dated January 6, 1890. This agreement was signed only by Mr Quigley, but, if delivered to the defendant, the children having thereafter been left by the defendant at the home of the plaintiff, so long as he permitted them to remain, without objection, he is liable for the payment of the sum named therein per month for board and care of said children, and for no greater sum. This agreement does not, however, include the cost of any clothing that might be provided for the children, or that was provided, if any was so provided, if you shall so find during that time; and if you should find from the evidence that the plaintiff did furnish any clothing for them during that time—that is between the time when the children were taken by him and the time when they were taken away from him and taken to the convent by the defendant, but if said clothing was furnished at the request of defendant, or was necessary for said children and was not furnished by defendant; was reasonable, fit and suitable for such children, for the children of other parents in like situation in life and of like financial ability, then the defendant

would be liable for the reasonable and fair value of the same.

The burden of proof, gentlemen, is upon the plaintiff to show what, if any, such clothing was provided by him, while the children were with the plaintiff, up to the time they were taken from the plaintiff, and what was the fair cash value of the same at the time so provided.

The first matter for your consideration and investigation will be, the extent of the defendant's liability, reason of the board and care and clothing furnished, during this time—and I am referring now in all that I say to the time between the period when the children were left with Mr. Quigley and the time when they were taken away to the convent. And to this value when you so find it, interest may be added, at six per cent, from said time to the first day of this term of court, which is the 14th of September, 1896.

And I further say to you as a matter of law, that unless you find that the plaintiff refused, on the request of the defendant, or in some way interfered with the taking of the children from the plaintiff by the defendant by reason of a notice—either verbal or written—whichever you shall find—if you find either—served by the defendant, Murphy, upon the plaintiff, Quigley, or claimed to have been so served, that so long as he allowed or permitted the children thereafter to remain with the plaintiff, his liability, whatever it was before the giving of the notice, would continue. If the plaintiff refused to deliver the children to him at that time, that is, upon his demand, or interfered with his taking of them away, then the time when he so refused or so interposed to prevent their being taken from him by the father would terminate the liability of the defendant to him.

Now, gentlemen, you are to determine, under these rules, what amount the plaintiff is entitled to recover against the defendant by reason of the transactions prior to the taking of the children from Quigley by Murphy. And in any event, whatever you shall find that amount to be, the plaintiff will, in any event, in this case be entitled to a verdict at your hands.

Having disposed of this branch of the case, you will then proceed to consider the questions necessary to be determined

as to whether or not the defendant is liable to the plaintiff for board, clothing, care, or medicines furnished for these children from the time when the children were taken from the convent by the mother and returned to the plaintiff.

No claim can be allowed of the plaintiff while the children were in the convent, but from the time that they were returned up to the time that the mother afterwards took them from Mr. Quigley—which I think is said to have been May 1, 1894—the question as to the liability of the defendant for what transpired during this time, and the right of the plaintiff to recover for the board, care, clothing and maintenance of these children, is for you to determine, as I say under certain rules of law and upon the evidence. And, considering these questions—the question of this liability—during that time, you will be required to observe certain rules of law, which I will now give you.

And, first: It is the duty of a father to provide reasonably for the support and maintenance of his minor children, if he be of ability to do so. He is under obligations to do so, both by natural law and the statutes of the state of Ohio. It is provided by section 3110 of the Revised Statutes of Ohio, that the husband must support himself, his wife and his minor children, out of his property or by his labor; if he is unable to do so, the wife must assist him in so far as she is able. By the terms of this statute the husband is made primarily liable for the support of his minor children, and is bound to do so, out of his property or by his labor, if he is able to do so.

There is a further provision by the statutes of Ohio, known as section 3113. "A husband and wife cannot by any contract with each other alter their legal relations, except that they may agree to an immediate separation, and may make provision for the support of either of them and their children during the separation."

Again, the father being able, is bound by law to support his infant children and to furnish necessary clothing and care, yet the circumstances of the children, the necessity and the proper amount and kind of care, clothing and support to be furnished children, are under ordinary cir-

cumstances, by law left to the sole discretion of the father, subject, however, to the rule that such discretion must not be abused to the injury of the children. If, however, the father, being able, neglects or refuses to provide for his children so as to render it necessary that some other person should so provide or care for them, then the law implies a promise or obligations on the part of the father to pay for the proper amount and kind of care, clothing and support of such minor children.

If you find from the evidence in this case that the children of defendant were placed by him in a convent in this city for education, care and support, and that said convent was a proper and suitable place for said children to be and remain in, and that said children were taken from said convent by their mother, against the wish of the defendant; and find further that the plaintiff thereafter furnished board and clothing and care for said children, which wish was known to the plaintiff, and that during the time the plaintiff furnished such board, care and clothing, the defendant had made suitable and proper provision for their care, support and maintenance, and so notified the plaintiff, and requested the plaintiff to deliver them to him in order that he might so provide for them, and if the plaintiff refused to deliver the children to him, then from such time as he so refused upon such demand, he would have no claim against the defendant for any support, care or maintenance of the children; unless you also find that there was either an expressed contract between the plaintiff and defendant, whereby the defendant promised to pay for such board, care and clothing, or that under the rules which I will give you hereafter, a contract to make such payment may be implied.

Now, in making an application of these rules to the evidence in this case, I will say further to you as a rule of law to govern you:

1. The duty of the defendant here as the father of these children, still rests upon him, and has rested upon him in full and binding force, notwithstanding under the articles of agreement between him and his wife, they during the time that these children were with the plain-

tiff, were living separate and apart from each other. These children were not and could not be parties to that agreement. It is no matter for inquiry on your part now in this case as to what were the causes of that separation, or by whose fault it was produced, and while the children must of necessity to some extent be affected by the breaking up of the family home, yet it is not the policy of the law to deprive them of their rights to support and maintenance and culture on account of any difficulty or dissension between their parents.

2. In determining whether there has been a proper performance by the father, of his obligation in this case to support, maintain and care for these children, the question as to what was or is for the best interest of the children, must be considered by you. The fundamental principle relative to such matters is to regard the benefit of the infant; to make the welfare of the children paramount to the claims of either parent. And while the discretion is with the father primarily to select the method and the way in which he shall provide for such support and care and maintenance of his children, yet he cannot be permitted in the exercise of such discretion unnecessarily or without reasonable cause so to act as to injure his children in their health, comfort or enjoyment, or future prospect in life.

3. It was the duty of the defendant in this case when these children were removed from the home of the plaintiff and placed in the convent, to provide for their maintenance, support and care under and in accordance with these rules, and it is for you, gentlemen of the jury, to determine from the evidence before you, considered under these rules, whether in placing them in the convent, he did so provide. In determining this question you must consider all the conditions and circumstances under which these children were placed there in so far as they are disclosed in the evidence before you; their ages at the time the defendant placed them in the convent; their health and physical condition and the manner in which they had been accustomed to live; the care which they had before received; the character of the convent so far as the care of such

children of similar ages is concerned its method of treatment of such children—in short, gentlemen, everything disclosed to you in the evidence that would affect the comfort, health and physical well being of the children in the present, and their prospects for happy and useful lives in the future.

The discretion being in the father to select the place where and the proper person who should so provide for his children, the presumption is that the convent was such a place, and the burden is upon the plaintiff to show by a preponderance of the evidence that the provision so made was not under these general rules and under the evidence in this case a proper provision. If you find under these rules that such provision was not such a proper provision then these children, being infants of such tender age as not to have the ability or judgment to act for themselves, their mother would have the right to remove them to some proper place and provide for their support and maintenance until the father should thereafter provide proper and suitable maintenance, and support for the children; and for the reasonable expense of so doing the father would be liable to the person who furnished the same at the request of the mother, and such person would not be a volunteer, although bearing no relation whatever to the children.

Now, as you so find under these rules and upon all the evidence before you, will depend the right of the plaintiff to recover for the support and maintenance of the children by reason of their having been placed in his hands by the mother after she took them from the convent.

If, however, you shall fail to find that the mother was justified in taking the children from the convent and placing them in the hands of the plaintiff, there is second and still a further inquiry which you would be required to make: It is conceded in the evidence in this case that very soon after the children had been so taken from the convent and placed in the home of the plaintiff, the defendant was notified that she had done so; that within a short time thereafter he visited and saw the children at the home of the plaintiff, and that he saw them thereafter from time to time while

they so remained in the home of the plaintiff. Now, gentlemen, if you find from the evidence before you, that he, the defendant Murphy, in this case, knew, or had full means of knowing, of the character of the support and maintenance—of the board and clothing and care—which plaintiff was during this time furnishing to these children, and permitted them, without objection thereafter made or during that time made, to remain in the house of the plaintiff, receiving this care, maintenance and support from the plaintiff without himself providing other proper and suitable maintenance and support for the children, you will be justified in finding an implied promise on his part to pay the fair and reasonable value of the board, clothing and care so furnished by the plaintiff.

In answer to this implied promise, evidence has been given on behalf of the defendant, that the mother has told him, in effect, that she was providing for the support of the children, and that he would not be called upon to make any payment for the same; and evidence has been offered tending to the contrary, but I say to you in reference to this that while you must consider all this evidence, that unless the facts in reference to any such representation made by the mother were brought to the notice of the plaintiff, or he was otherwise so notified, they would not as against him, affect any such implied promise, if any such promise you should find, as being otherwise implied under the rules which I give you.

Now, gentlemen, if you fail, upon all the evidence produced before you, all considered, and upon a preponderance of the same—not beyond a reasonable doubt, as in a criminal case, but only by the preponderance of the evidence—fail to find that the defendant is liable, upon either of these grounds that I have stated, to the plaintiff for any board, clothing or care furnished by the plaintiff after the children were returned to him from the convent, then you will be relieved from further consideration of this branch of the case, and you will not find any amount for the support of the children after they were so returned to him from the convent.

It, however, you do find from the evidence before you and the rules given you, that the plaintiff is entitled to recover for the maintenance, care, board or clothing furnished by plaintiff to these children, after they were returned to him from the convent, then you will proceed to determine the amount that the plaintiff is so entitled to recover. Such amount will not be governed by the agreement of February 6, 1890, but will be the fair and reasonable value of the board, care and clothing so furnished by the plaintiff to these children, providing that such board, care and clothing was such as was reasonably suitable and proper for children of their age, considering the situation in life and financial ability of the father. The amount must not exceed such sum as you will find will reasonably and fairly compensate the plaintiff for the maintenance of the children in such situation of life as the children of the defendant should fairly occupy, and it must further not exceed the amount claimed by the plaintiff in his petition; but if you do find any sum so due, you may add interest upon that from the 1st day of May, 1894, to the 14th day of September, 1896, the first day of this term of court.

And now, gentlemen, I only need to remind you, what you all know and have been repeatedly told, as you are all regular jurors, that upon you rests the responsibility of determining the facts in this case upon the evidence before you, paying careful attention to the rules of law which the court gives you. As to the facts, the court expresses no opinion one way or the other.

Most of the witnesses have been upon the witness stand; you have seen them and been able to judge of their manner. You are to take into consideration their appearance upon the witness stand, as well as any interest or feeling they may have in the case. In short, considering all these witnesses, judge for yourself as to the credit to be given to their testimony; and where there may be any difference between them, you will determine calmly and dispassionately, and not allow any feeling to influence you; but calmly and dispassionately determine what are the facts and what is

just and right; remembering the verdict that you render is upon your oath and conscience.

The jury brought in a verdict in the case for the plaintiff in the sum of \$1,135.74.

*Hurd, Brumback & Thatcher*, Attorneys for Plaintiff.

*Parks & Van Campen*, Attorneys for Defendant.

### SUPREME COURT PROCEEDINGS.

COLUMBUS, O., June 22, 1897.

#### General Docket.

2736. The State of Ohio ex rel. Attorney General v. The Manufacturers' Mutual Fire Insurance Company, of Columbus, O. Quo warranto. Judgment of ouster.

2740. The State of Ohio ex rel. Attorney General v. The Ohio Manufacturers' Mutual Fire Insurance Company, of Columbus, O. Quo warranto. Judgment of ouster.

4649. Caroline T. Plessner et al. v. Joel M. Gloyd et al. Error to the circuit court of Lucas county. Judgment affirmed.

4651. The Ohio Farmers' Insurance Company v. Joel Danison. Error to the circuit court of Perry county. Judgment affirmed.

4654. R. G. McQuigg et al. v. Henry Culens. Error to the circuit court of Muskingum county. Judgment affirmed.

4662. Elizabeth White et al. v. Fred W. Agnew et al. Error to the circuit court of Licking county. Judgment affirmed.

4663. Charles R. Tulloss, Administrator, v. C. W. Conrad et al. Error to the circuit court of Licking county. Judgment affirmed.

4667. Robert Leckey v. Emanuel V. Wysbrod. Error to the circuit court of Hancock county. Judgment affirmed.

4686. Emma J. Ashley v. Michael Henahan. Error to the circuit court of Lucas county. Judgment reversed and cause remanded for a new trial.

4704. Robert N. Pollock v. The Cleveland Shipbuilding Company. Error to the circuit court of Cuyahoga county. Judgment reversed and modified.

4886. Harriet W. McAlpin v. Alexander Clark et al. Error to the circuit court of Hamilton county. Application for rehearing not entertained.

5263. Hiram P. McKnight v. E. G. Coffin. Error to the circuit court of Franklin county. Judgment affirmed.

5453. The State of Ohio ex rel. The Underwriters of American Lloyds v. William S. Matthews, Superintendent of Insurance of the State of Ohio. In mandamus. Writ refused and petition dismissed on authority of State ex rel. v. Moore, 42 Ohio St., 103. Minshall, J., dissents.

5581. The City of Cincinnati v. The Cincinnati Inclined Plane Railway Company. Error to the superior court of Cincinnati. Judgment reversed.

5565. The Cincinnati Street Railway Co. v. The Cincinnati Inclined Plane Railway Company. Error to the superior court of Cincinnati. Judgment reversed.

5572. The State of Ohio ex rel. Frank Bachman v. Edwin Wright. Error to the circuit court of Darke county. Judgment affirmed.

The following causes on the general docket have been dismissed for failure to file printed record:

5499. Herbert Byard v. The B. & O. S. W. Railway Company. Error to the circuit court of Athens county.

5500. Joseph Powlowski v. Ignatz Tarlowski et al. Error to the circuit court of Cuyahoga county.

5504. Edward H. Drinkwater v. Eglantine Jones. Error to the circuit court of Lucas county.

5524. John A. Chilcote v. The State of Ohio ex rel. Mary Ida Hodgkins. Error to the circuit court of Licking county.

5533. Henry O. Dorsey et al. v. Josephine M. Fulton. Error to the circuit court of Licking county.

#### Motion Docket.

2915. The State of Ohio ex rel. The Underwriters of American Lloyds v. William S. Matthews, Superintendent of Insurance of the State of Ohio. Motion by plaintiff for allowance of an alternative writ of mandamus in cause No. 5453, on the general docket. Motion overruled.

2949. John R. McLaughlin et al. v. James A. Miles. Motion by plaintiff for extension of time to file printed record in cause No. 5529, on the general docket. Motion allowed.

2950. Sibella Pink v. Ezra V. Dean. Motion by plaintiff to reinstate cause No. 4663, on the general docket. Motion overruled.

2951. F. M. Chandler v. The Grand Lodge of Ohio et al. Motion by plaintiff for temporary injunction in cause No. 5529, on the general docket. Motion overruled.

2952. A. T. Anderson v. The Grand Lodge of Ohio et al. Motion by plaintiff for temporary injunction in cause No. 5600, on the general docket. Motion overruled.

2953. A. T. Anderson v. The Grand Lodge of Ohio et al. Motion by plaintiff to dispense with printing record and briefs in cause No. 5600, on the general docket. Motion allowed.

2954. *N. E. Gilbert v. The Grand Lodge of Ohio et al.* Motion by plaintiff for temporary injunction in cause 5601, on the general docket. Motion overruled.

2955. *A. E. Gilbert v. The Grand Lodge of Ohio et al.* Motion by plaintiff to dispense with printing records and briefs in cause No. 5601, on the general docket. Motion allowed.

2956. *Albert G. Corre v. Mary R. Rogers, Administratrix.* Motion by defendant to dismiss cause No. 4820, on the general docket. Motion overruled.

2957. *The State of Ohio v. Richard Aston.* Motion by plaintiff to advance cause No. 5415, on the general docket. Motion allowed, cause advanced, and briefs to be filed within rule.

2958. *The Central Trust Company of New York v. Stevenson Burke et al.* Motion by defendant to advance cause No. 5518, on the general docket. Motion allowed, cause advanced, and briefs to be filed within rule. Oral argument requested.

5959. *Edward Foutz v. Manley L. McGee et al.* Motion by plaintiff to dispense with printing record in cause No. 5584, on the general docket. Motion overruled.

2960. *The State of Ohio ex rel. Attorney General v. Louis E. Zeigle.* Motion by plaintiff to advance cause No. 5128, on the general docket. Motion allowed, cause advanced, and briefs to be filed within rule.

New cases filed in the supreme court since June 10, 1897.

5599. *Frank M. Chandler v. The Grand Lodge of Ohio et al.* Error to the circuit court of Cuyahoga county. Frank N. Wilcox and L. A. Wilson, for plaintiff. Barton Smith and Squire, Sanders & Dempsey, for defendants in error.

5600. *A. T. Anderson v. The Grand Lodge of Ohio et al.* Error to the circuit court of Cuyahoga county. Frank N. Wilcox and L. A. Wilson, for plaintiff. Barton Smith and Squire, Sanders & Dempsey, for defendants.

5601. *A. E. Gilbert v. The Grand Lodge of Ohio et al.* Error to the circuit court of Cuyahoga county. Frank N. Wilcox and L. A. Wilson, for plaintiff. Barton Smith and Squire, Sanders & Dempsey, for defendants.

5602. *Madison Pavey v. Eli Hull et al.* Error to the circuit court of Licking county. Mills Gardner and Charles Pavey, for plaintiff. J. B. Jones and Edward Kibler, for defendants.

5603. *Trustees of the Otterbein University v. Peter Smith, Admr.* Error to the circuit court of Seneca county. Seney & Sayler and J. M. Bever, for plaintiff. McCauley & Weller and Lester Sutton, for defendant.

5604. *Trustees of Union Township v. The State of Ohio ex rel. George Wagy.* Error to the circuit court of Licking county. Kibler & Kibler, for plaintiff. S. M. Hunter, for defendant.

5605. *The B. & O. R. R. Co. v. Frederick Lisey.* Error to the circuit court of Licking county. Kibler & Kibler, for plaintiff. S. M. Hunter, for defendant.

5606. *Frederick Heidorn et al. v. Charlotte K. Wright.* Error to the superior court of Cincinnati. C. W. Baker, for plaintiff. Kramer & Kramer and P. A. Reece, for defendant.

5607. *The State of Ohio ex rel. The National Life Association v. William S. Matthews, Superintendent of Insurance.* Mandamus. Huggins, for plaintiff. R. M. Patterson, for defendant.

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## OHIO STATE REPORTS.

Volume 54, Ohio State Reports, is now ready for delivery, and may be obtained at \$1.50 per volume, payable in advance.

The supreme court has adjourned for its summer vacation.

The democrats of Clermont and Brown counties have nominated Hon. John S. Parrott for common pleas judge of the Clermont-Brown judicial district. Mr. Parrott was nominated by acclamation.

In the syllabi of the supreme court proceedings will be found the syllabus in the case brought to test the constitutionality of the Ohio Torrens Land Registration act. The opinion will appear later.

The American bar association will hold its next annual meeting at Cleveland, Ohio, on August 25, 26, and 27, 1897. Programs or information in relation to the association may be had by addressing John Hinkley, secretary of the association, 215 Charles Street, Baltimore.

A transcript of the case of H. W. Chapman, treasurer of Lorain county, against the Wellington National Bank, decided by our supreme court, April 27, 1897, the decision of which will be found on page 159 of the advance sheets of volume 56, Ohio State Reports, was prepared last Saturday for use in the supreme court of the United States, to which the case is to be taken. It will be remembered that this case involves the taxation of stock in national banks under the laws of Ohio. This decision in effect held that the debts of holders of stock in national banks could not be offset from the tax valuation of their stock. It is claimed that the supreme court of the United States has already held indifferently on this same question.

Lawyers have a ludicrous habit of identifying themselves with their clients by speaking in the plural number. "Gentlemen of the jury," said a prominent attorney of the Cleveland bar, recently, "at the moment the policeman says he saw us in the tap, I will prove that *we* were locked up in the station house, in a state of intoxication."

At the Republican judicial convention held at Toledo on Tuesday of this week, Judge R. S. Parker was renominated for the circuit bench for the sixth judicial district. And Judge I. P. Pugsley, was renominated for judge of the common pleas bench for the first subdivision of the fourth common pleas judicial district. Both nominations were made by acclamation, there being no opposition.

Charles N. Cunningham, of Cleveland, who forged Judge E. T. Hamilton's name to a check for \$75,000, was sentenced last Saturday by Judge Stone of the Cuyahoga common pleas to serve five years in the penitentiary. The motion for a new trial was overruled. The case excited the attention of the medical world, in that expert physicians held that owing to a depression in Cunningham's skull, which pressed upon the brain, he was virtually insane, and irresponsible for his actions. He underwent an operation to remove the pressure and claimed that it cleared his reason. The court held, however, that there was no evidence that the deprestation affected Cunningham's sanity, and accordingly sentenced him to the penitentiary.

We are in receipt of a beautiful bound volume of poems written by Charles H. Collins, of Hillsboro, Ohio. The author, Charles H. Collins, was born in Maysville, Ky., and is the son of Gen. Richard Collins, a distinguished lawyer and legislator in Ohio and Kentucky. Charles Collins is a lawyer and has enjoyed a lucrative practice from which he has acquired a comfortable competency. The author has traveled a great deal, both in Europe and America.

He is now sixty-three years of age, has a vigorous constitution, pleasant address, and is a fluent speaker. He is also the author of "Echoes from Highland Hills," "Highland Hills to an Emperor's Tomb," "Wibbleton to Wobbleton," "Our Common Schools," "The Love of the Beautiful." His last work: "The New Year Comes, My Lady," the volume now before us, appeared last year, and we bespeak for it a good sale.

#### ADMITTED TO THE BAR.

The following graduates of the Ada Law School were admitted to the bar and sworn in before the supreme court on Thursday of last week:

Frank S. Ansley.  
Owen L. Albright.  
Elbert M. Bell.  
Adam C. Bowersox  
Arthur W. Bordner.  
John W. Burris.  
John T. Butler.  
Asa C. Cooney  
Carl F. Clement.  
Alvin Carver.  
D. Eugene Carlin.  
Frank E. Duffield.  
Elmer G. Derr.  
Harmon R. Ewing.  
J. Carroll Heaton.  
Kent P. Johnson.  
Harry V. Kahle.  
A. F. Klaeson.  
William J. Mead.  
Earl H. Noel.  
Josiah C. Paxson.  
Samuel T. Rife.  
Willis P. Rowland.  
Edward S. Stephens.  
Frank Y. Sherdlandy.  
Francis M. Shumaker.  
George D. Simmons.  
Volney A. Troxel.  
Marshall Van Horn.  
Everett G. Young.

#### OUR DIVORCE LAWS.

Under the old canon law, divorces were not granted for any purpose whatever, and, therefore, when a man took a wife unto himself "for better or for worse" he was obliged to keep her, no matter how much worse his condition proved to be.

The civil law, however, was not so exacting, and under its rule very trivial offenses against the dignity of the marital relations was sufficient ground on which to secure a divorce. For instance, a husband could secure a divorce from his wife if she attended the theatre or other place of public resort without his consent having first been secured. Between these two great extremes came the common law, with a marked tendency toward the first, the rule being not to grant any divorces except in a few extreme cases.

So long as the common law prevailed, little progress was made from this condition, but under the statutes of the various states the old common law theory that man and wife were one, of which the *man* constituted the one—the great I am—became exploded, and with the enlargement of the rights of the wife came also an enlargement of the grounds by which the bonds of matrimony could be severed, and it is not surprising, for it is not easy to say why a man and woman who have entered into a civil contract should be compelled by law to remain bound by that contract when every element of the spirit of the contract has been broken.

It has been said that public policy forbids the granting of divorces except in a few heroic cases, of which adultery and desertion are the principal ones, and in some states the law is so lenient as to permit a divorce when such cruel and inhuman treatment has been perpetrated as to endanger life. Surely the best interests of society are not subserved when a woman and a family of children are obliged to sink deeper into poverty and shame because of the worthlessness of the father and husband. Good citizens are not made out of a family whose head is spending his days in idleness and his nights in bumming or gambling, while the property he may have been accumulating in better days is being destroyed, and the efforts of the faithful, patient, toiling wife are being wasted, because of the burden she must bear in supporting a worthless husband, while he squanders whatever he can obtain. If the wife were allowed to rid herself of him, she could teach her children the principles of frugality, and by their strictest enforcement a respectable livelihood could be maintained and the family reared in decency and honor.

The rule should be that whenever a husband or wife willfully and without reason ceases to perform their duties as such husband or wife, then the innocent one should no longer be bound by the marriage contract. Such is the rule in all other contracts; such should be the rule in this one case.

#### IGNORANCE OF ATTORNEY AS GROUNDS FOR NEW TRIAL.

As a general rule, a party is bound by the acts of his attorney, and is not entitled to relief because of a mere negligent omission of an attorney, who is presumably competent. In ordinary civil cases this rule is very rigid, and it is required, where a party has been injured by the neglect or misconduct of his attorney, that he shall obtain relief by an action against his attorney.

The rule is enforced with stern severity and the courts have generally compelled parties to abide by the consequences of the negligent omission, blundering or improper management by their attorneys in legal proceedings. In civil cases the rule is broadly laid down that "neither the ignorance, blunders, nor misapprehension of counsel, not occasioned by the adverse party, is a ground for vacating a decree or judgment."

This severity is generally justified by considerations of public policy as well as by the plain demands of justice. But cases are not wanting in which the attorney has been guilty of such glaring incompetency and neglect that the court has been impelled through a sense of justice to award a new trial. Such a case was that of *State v. Jones*, 12 Mo, App., 93, and it is doubtless whether the annals of criminal law have ever presented a parallel case. The defendant was convicted of murder in the first degree and sentenced to death. So far as the record discloses, no error was committed by the court in the conduct of the trial, and the only ground relied upon by the defendant for a new trial was the ignorance, imbecility, and incompetency of his attorney, and his gross mismanagement of the case. The records disclosed so many instances of gross incompetency and mismanagement that it is hard to conceive how the trial judge could have tolerated such a travesty on justice.

To quote from the opinion rendered by Lewis, P. J. "Among many similar examples, it was urged that no act of congress had ever authorized the State of Missouri to delegate to the city of St. Louis, the power enforcing the laws; and that the State could not offer proof of the killing without first proving affirmatively that the deceased was alive and that he did not kill himself. Objection was made to an officer testifying, because he undertakes to testify to a confession which he has already testified to in another court, and because it is presumed that he will testify to the same in this court. It was objected that a confession made in Illinois could not be proved in Missouri, for want of jurisdiction, and because the limited States have made no law to authorize it."

Upon a motion being made for a new trial, on the ground that the defendant's attorney was incompetent and had been guilty of mismanagement, the attorney filed a counter affidavit, in which he sought to extenuate his conduct and show that the defendant had not been prejudiced thereby, and the court severely scored him for his seeming impropriety in volunteering an affidavit to prevent his convicted client from obtaining a new trial, and reversed the judgment; concluding its opinion with the following language: "Modern civilization stands aghast at the barbarity of the ancient law which denied to a prisoner the aid of counsel 'learned in the law,' when on trial for his life. The wisdom and humanity of the present age demand that the maxim, 'Every man is presumed to know the law' shall be reversed, both in theory and in practice, when applied to the legal methods of conducting a defense against a charge of felony. \* \* \* It would be a most unworthy exercise of the judicial function, to administer the shadow of the law, but not its substance. We consider that the prisoner here in effect, went to his trial and his doom without counsel, such as the law would secure to every person accused of crime."

## SUPREME COURT OF OHIO.

### Official Record of Proceedings.

TUESDAY, June 23, 1897.

Causes to and including No. 4773, on the General Docket, are called and marked submitted. The next call will be to and including No. 4889.

#### General Docket.

5572. The State of Ohio ex rel. Frank Bachman v. Edwin Wright. Error to the circuit court of Darke county.

WILLIAMS, J.

1. A mayor of a municipal corporation who has been regularly elected to the office, is entitled to serve until his successor is qualified; and while he continues to so serve, on account of a failure to elect his successor, there is no vacancy in the office, nor is the council authorized to make an appointment thereto.

5. The jury selected to try a contested election case instituted by a rival candidate against one who has, by the proper authority, been declared duly elected to the office of mayor at a regular municipal election, is authorized to decide, and should determine which of the candidates was elected, or, that there was no valid election of either, as the facts may warrant; a finding that the contestee did not receive a majority of all the legal votes cast at that election, and a decision that, therefore he was not elected to the office, is incomplete, and insufficient to defeat his title to the office.

Judgment affirmed.

4686 Emma J. Ashley v. Michael Henahan. Error to the circuit court of Lucas county.

MINSHALL, J.

1. The general rule is, that one who seeks to recover on a contract must show substantial performance on his part, and this rule applies to a "building contract" as to any other. But slight omissions and inadvertences should be disregarded. Where there has been an honest effort by the contractor to perform, and not a wilful omission, substantial performance is all that is required.

2. The plaintiff below entered into a written contract with the defendant to make the excavations and construct the foundation walls, of a building she was about to construct for a certain sum. It provided for the payment from time to time on estimates made by the architect, and that the final payment should be made in a certain time after the contract is completely finished, on the certificate of the architect in writing, that the work has been done to his satisfaction.

*Held*, That without this certificate, or a waiver of it by the owner, no recovery can be had.

3. The contract provided that the contractor should make the excavations and put in the stone foundations of the proposed building, according to the plans and specifications, including all labor and material incident thereto. In order to make the excavations of the required depth, which was some 22 or 23 feet

it became necessary to underpin a house standing on the line of one of the foundations, and to use a certain quantity of lumber for the purpose of sustaining the sides of the trenches. *Held*, That the underpinning of the house and the lumber used in the trenches, are a part of the work to be done included in the terms of the contract; and that a recovery therefor cannot be had on an implied obligation to pay what it is reasonably worth.

4. The contract contained the following clause: "The contractor shall make no claim for additional work unless the same shall be done in pursuance of an order from the architect, and notice of all claims shall be made to the architect in writing within ten days of the beginning of such work."

*Held*, That under this provision no recovery can be had for work in addition to that provided in the contract, where the work done is necessary to the performance of the contract, unless the work was done in pursuance of the architect, and notice of the claim be given to him in writing as required, unless waived by the employer.

5. Such stipulation being for the benefit of the employer, proof of a waiver must either be in writing, or by such clear and convincing evidence as to leave no reasonable doubt about it.

Judgment reversed, and cause remanded for a new trial.

5380. *State of Ohio ex rel. The Attorney General v. Walter D. Guilbert, Auditor of State, et al.*

In Mandamus.

SHAUCK, J.

1. The remedy by due course of law guaranteed by section 16 of the Bill of Rights, extends to all the adversary rights of persons in property, and requires that before there is a judicial determination affecting such right process to obtain jurisdiction of the person claiming it shall be issued and served, except that the legislature may provide for a substituted or constructive service to be made when actual service is impracticable. The act of April 27, 1896, entitled "An act to provide for the registration of land titles in Ohio," etc. (92 O. L. 220), is repugnant to this section of the constitution.

2. Said act is repugnant to section 19 of the Bill of Rights, because it attempts to authorize the taking of private property for uses that are not public, and without compensation.

3. Said act is repugnant to section 1, of article 4, of the constitution, because it attempts to confer judicial power upon the county recorder.

Writ refused.

4426. *Ohio ex rel. McKinney v. Commissioners of Washington county.* Error to the circuit court of Washington county.

BRADBURY, J.

1. A report made to the court or common pleas by the county commissioners, of their financial transactions for the preceding year,

under section 917 Revised Statutes, is sufficient if it sets forth the several immediate subjects of expenditure, and the sums paid on account of each, although it does not state specifically each item of the sums thus expended.

2. Such report need not set forth the several subjects of expenditure where the funds provided by the county commissioners are set apart and expended under the direction of the board of infirmity directors, or the board of trustees of a children's home. In such cases, it is sufficient to state in the report, the sums set aside for the use of said boards.

Judgment affirmed.

SPEAR, J., dissents as to first proposition.

4654. *R. G. McQuigg et al., Trustees et al. v. Henry Cullins.* Error to the circuit court of Montgomery county.

SPEAR, J.

1. The order of vacation of a township road by the township trustees, in a proceeding conducted under chapter 3, title 7, of the Revised Statutes, has the effect to relieve the public from any duty to keep such road in repair. But such order does not authorize the closing up or obstructing of the road against the objection of one who has acquired an easement in it.

2. Where, in such case, the trustees and others threaten to obstruct or close up such road, injunction will lie. And if it appear that such threatened action will destroy the easement of an owner of adjacent land in such road, and no other road reasonably suitable to meet the necessities of such owner has been provided, injunction forbidding such obstruction or closing up of such road will be granted.

Judgment affirmed.

4704. *Robert N. Pollock v. The Cleveland Ship Building Company.* Error to the circuit court of Cuyahoga county.

SPEAR, J.

1. The ownership of a riparian proprietor to the middle of a navigable river does not carry with it the right to the exclusive use of the water over land ordinarily covered by water, but is subordinate to the paramount easement of navigation by the public, which includes the right to use such water for navigation and commerce, and such uses as may be reasonably incident thereto.

2. Among the rights of the public is that of mooring vessels for the purpose of repairs and of putting in engine, boilers and machinery, after such vessels have been launched. Such use reasonably enjoyed, is not a trespass upon the lands of a riparian owner, in front of whose river bank, outside of the dock line, such vessels are moored, and such owner will not be entitled to an injunction forbidding such use, unless special injury to his property is shown.

3. But the right of the public does not extend to use of lands of the owner not covered by water. And where a builder of vessels so moored carries lines from them

across the river bank of such riparian owner, against his objection, and fastens them upon the land of such builder, and insists upon the right to continue such acts, the riparian owner may be entitled to an injunction, although his land is unimproved, and such acts produce no actual present damage.

Judgment reversed and modified.

5565. The Cincinnati Street Railway Company v. The Cincinnati Inclined Plane Railway Company et al. Error to the superior court of Cincinnati, at special term.

BURKET, C. J.

1. When a question of law or fact is reserved by the superior court of Cincinnati, at special term to the general term upon a bill of evidence, and final judgment is rendered thereon, the general term has no power to remand such judgment to the special term for further proceedings. The cause may be remanded to the special term for trial as to matters left adjudicated, but in such trial, the judgment must be taken and held as final, as to the questions upon which it was rendered, but it may be used as a factor in moulding the decree covering the whole case.

2. When it is provided in a final judgment, not rendered in a proceeding in error, that its operation shall be stayed for a given time, with liberty to apply for an extension of the time, such application must be made to the court rendering the judgment, or having control of it on error.

3. A final judgment was rendered by the superior court of Cincinnati at general term, upon questions of law and fact on a bill of evidence reserved at special term to the general term, in which judgment it was ordered that its operation should be stayed for six months, with liberty to apply for an extension of the time. Upon proceedings in error the judgment was affirmed by this court and remanded to the general term for execution. Thereafter the general term remanded the cause to the special term for further proceedings in accordance with the terms of judgment; and on motion for that purpose, the special term granted a suspension of six months additional time, with liberty to apply for a still further extension of time: *Held*, That the general term had no power to remand the judgment to the special term for such further proceedings, and that the order of suspension made at special term is void, for want of jurisdiction of the subject matter.

4. While a court may vacate or modify its judgment or orders as provided by statute after the close of the term of court at which they are rendered, the court has no power in the absence of proceedings under the statute, to suspend the operation of such judgments or orders after the close of such term, except in so far as that power is expressly reserved in the entry of the judgment; and under an order appended to a judgment by which its operation is suspended for a definite period, with the right to apply to the court for an extension of such suspension, the application

for such extension must be made before the expiration of the time of the original suspension, and unless the application be so made, the court is without authority to grant it. Under such an order there is no power to grant a new suspension after the expiration of the original suspension.

Judgment reversed.

4650. The Board of Trustees of the Ohio State University v. Henry P. Folsom et al. Error to the circuit court of Pickaway county.

The will of Henry F. Page, deceased, contained a devise to the Ohio State University to be a part of an endowment fund; and provided that if the devise to the university should fail or be held void for any cause, it should then go to the children of two of his deceased brothers. In a subsequent codicil, he fully empowered his daughter, Isabel, to ratify and confirm his bequest to the university; and further provided, that if she complies with this request, the devise over to the children of his deceased brothers "is revoked." The testator died within a year from the making of the will, so that the devise to the university became invalid, by reason of the provisions of section 5916, Revised Statutes. The daughter executed the power given her by the will, by executing and delivering a deed for the property to the university. She has since deceased.

BY THE COURT.

It is quite clear that the children of the testator's brothers can take nothing under the provisions of the will, as the fact—the making of a deed to the University by the testator's daughter—has occurred, on which it was not to go to them, and they are not the testator's heirs. It is not material what construction the law may place on this will as between the University and the heirs of the testator's daughter; for the devise over in case the deed or ratification should not be made, is not made to depend upon the validity of the ratification in whatever form adopted, but on the fact only of its not being made.

The judgment of the circuit court is therefore reversed, and the petition of the plaintiffs below dismissed, on the facts conceded in the record.

5425. State on application of Franklin Alter, a Taxpayer, v. The Commissioners of Hamilton county et al. Error to the circuit court of Hamilton county.

BY THE COURT.

1. A suit by a taxpayer brought to enjoin the execution of an unconstitutional act for a local road improvement, is too late if not brought until after he has voluntarily paid all taxes assessed or to be assessed against him for that purpose.

2. Nor will it be a misappropriation of moneys in the county treasury to devote the sum made up of the taxes so voluntarily paid by taxpayers of the county to the purpose for which they were so paid.

Judgment affirmed.

4021. James T. Black, Receiver, v. James W. Robinson, Admr. Error to the circuit court of Union county. Cause settled and petition in error dismissed by agreement of parties.

**General Docket.**

FRIDAY, June 25, 1897.

5454. George W. Collett, Treasurer v. The Springfield Savings Society. Error to the circuit court of Clark county. Application of plaintiff in error and of the Attorney General, for rehearing not entertained.

5313. The State of Ohio ex rel. Attorney General v. Charles Kinney, Secretary of State. Quo Warranto. Demurrer to petition overruled, and judgment of ouster. Per curiam report.

**Motion Docket.**

2961. James M. Wentworth v. The L. S. & M. S. Ry. Co. Motion by defendant to dismiss cause No. 5543, on the General Docket. Passed for notice.

2962. The State of Ohio v. Harry Martin alias Jim Anderson. Motion for leave to file a bill of exceptions to court of common pleas of Franklin county. Motion allowed, cause advanced and request for oral argument noted.

2963. The C. S. & H. R. R. Co. v. Samuel K. Ziegler. Motion by defendant to advance cause No. 5553, on the General Docket. Oral argument requested. Motion allowed, cause advanced, briefs to be filed within rule, and request for oral argument noted.

2964. Selah Daniels, Admr., v. Henry P. Sanford, Rec'r. Motion by plaintiff for extension of time to file printed record in cause No. 5523, on the general docket. Motion overruled and cause dismissed.

2965. The State of Ohio ex rel. Attorney General v. The St. Paul Fire & Marine Ins. Co., St. Paul, Minn. Motion by plaintiff to advance causes No. 5475, 5476, 5489, 5490, 5491, 5492, 5493, 5494, 5495, 5515 and 5519, on the general docket. Motion allowed, causes advanced and assigned for hearing November 10, 1897. State to file its depositions by September 1. Defendants to file their depositions by October 2, and state in rebuttal by October 16, with leave to use oral evidence on the hearing. Printed briefs to be filed by November 3.

2966. Emmet Sasse v. The State of Ohio. Motion for leave to file a petition in error to the circuit court of Cuyahoga county. Motion overruled.



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5617. *M. Jackson v. M. B. Gary, assignee.* Error to the circuit court of Hancock county. *W. W. Chapman*, for plaintiff. *J. A. & E. V. Bope*, for defendant.

5618. *John O. Winship et al. v. William L. West.* Error to the circuit court of Cuyahoga county. *John O. Winship*, for plaintiff. *Lawrence & Estep*, for defendant.

5619. *Joseph C. Stuart v. Mary P. Gordon et al.* Error to the circuit court of Paulding county. *Snook & Wilcox*, for plaintiff. *W. F. Corbett*, for defendant.

5620. *Cecil L. Saunders et al., ex'rs, v. George Learman.* Error to the circuit court of Cuyahoga county. *Walter J. Hamilton*, for plaintiff. *Foran & Dowley*, for defendant.

5621. *Ida Bause, adm'r, v. Gustav Muhune, guard.* Error to the circuit court of Lucas county. *L. H. Wilkinson*, for plaintiff. *Saul Kohn*, for defendant.


5622. *John Walsh v. The C. H. V. & A. R. R. Co.* Error to the circuit court of Franklin county. *T. E. Powell, J. B. Foraker, R. A. Harrison and D. J. Ryan*, for plaintiff. *D. L. Sleeper*, for defendant.

5623. *Robert Wright v. The C. H. V. & A. R. R. Co.* Error to the circuit court of Franklin county. *R. A. Harrison, T. E. Powell, J. B. Foraker and D. J. Ryan*, for plaintiff. *D. L. Sleeper*, for defendant.


5624. *Michael S. Voyght v. The C. H. V. & A. R. R. Co.* Error to the circuit court of Franklin county. *R. A. Harrison, T. E. Powell, J. B. Foraker and D. J. Ryan*, for plaintiff. *D. L. Sleeper*, for defendant.

5625. *Thomas Shotwell v. The C. H. V. & A. R. R. Co.* Error to the circuit court of Franklin county. *R. A. Harrison, T. E. Powell, J. B. Foraker and D. J. Ryan*, for plaintiff. *D. L. Sleeper*, for defendant.

5626. *John W. Bryant et al., ex'rs, v. The Firemen's Fund Ins. Co.* Error to the circuit court of Hamilton county. *Kittredge & Wilby*, for plaintiff. *Stephens & Lincoln*, for defendant.



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## OHIO STATE REPORTS.

Volume 54, **Ohio State Reports**, is now ready for delivery, and may be obtained at \$1.50 per volume, payable in advance.

Judge McCarty, of the Stark common pleas court some time ago decided an odd case involving the ownership of land in the city of Massillon. It appears that one Emery Chandler bought of Mary Lomady a certain brick building but obtained the title to a lot three feet shorter than the building itself. Suit was instituted to determine the ownership of that short strip. Judge McCarty, held that when tracts of land are sold, if a small strip remains, that strip becomes the property of the last buyer, unless specification is made to the contrary. In this case the decree was that the brick building should remain, its owner to have title to the three feet, but the land below the projection of the eaves shall not become the property of this particular plaintiff.

What constitutes a valid tender was recently decided by Judge Swing of the Hamilton circuit court, in the case of *R. S. Storer v. Wm. Bohmann*. It appears that a tender had been made before suit was brought before the justice of the peace, but the tender was not made good previous to the trial before the justice by bringing the money into court. Swan at page 820, (10th ed) says: "The amount of money tendered must be brought into court and deposited with the justice of the peace." The case went to judgment before the justice and was brought to the common pleas on an appeal, when a tender was again made of the amount of the judgment and was paid into court but did not include the costs due the plaintiff before the justice. In order to have tendered plaintiff the amount due him it should have included not only the interest due on his claim, but also the costs due him up to the time of the tender, and this must have included the costs before the justice. This was not done, and therefore the plaintiff was entitled to judgment as to costs.

In the case of *Schulte v. Guethlein*, recently decided by the common pleas court of Hamilton county, it was held that one who has himself broken a contract cannot recover from another for violating the same contract. This was a case for \$42,500 damages for breach of contract, in refusing to take 160 shares of stock in the G. B. Schulte Co. It appears that Schulte refused to deliver the stock, and in March, 1896, Guethlein sued him in the superior court to compel a delivery. Schulte then changed his mind and admitted to the breach and consented to carry out the contract, but Guethlein had also changed his mind and dismissed his case. Schulte then brought the present suit in the common pleas court. Judge Davis held that the action could not be maintained.

*First*—Because it was *res adjudicata*, having been decided against Schulte by the superior court.

*Second*—Because Schulte, admitting that he had broken the contract, cannot recover, in the contract which he had himself violated.

Judge Hollister, of the Hamilton common pleas court filed an important opinion last week in the nine cases of the city of Cincinnati, for the use of *Wilson & Strack v. Jung et al.* The cases involved the validity of a sewer assessment of \$2. a front foot.

The defendants claimed that a sewer improvement is a street improvement, and that abutting lands cannot, within five years, be assessed for both improving the street by grading, etc., and for constructing a sewer in it, when the cost of both assessments exceeds twenty-five per cent. of the value of the lands, as in these cases.

The court held that this claim of double assessment fails; and with it fails also the contention that the values of the properties fixed by the superior court in the suit brought to enforce the assessments for the street improvements are not conclusive in this case, for the subject of action in the two cases are different: that the sewer is of no actual benefit to the defendant's property is immaterial. In cases where the court reduces an assessment because it is more than twenty-five per cent. of the value

of the property, no penalty can be recovered; but in cases where the assessment is not reduced the defendants should pay interest and penalty; where the assessment is reduced the plaintiffs must pay the costs; where the assessment is not reduced the costs will be equally divided between the plaintiffs and the defendants.

The appellate court of Illinois rendered a decision recently against black-listing by railway companies. The case was that of the Chicago, Cleveland, Cincinnati and St. Louis Railway Company, appellant, against Charles Jenkins, appellee. The appellee, a conductor, had been discharged from the appellant's employ under charges of larceny and embezzlement, and when he applied for a clearance card it was refused him. For this, a suit for damages was instituted, the plaintiff in his declaration, charging that it was the custom of the defendant company to give such cards to discharged employees, and that because of its refusal to him, he had been uniformly refused employment by all companies to which he applied after his discharge. Conspiracy between the defendant and other roads was averred in aggravation of damages. Judgment was rendered by the Wabash circuit court in favor of the plaintiff and this judgment was affirmed by the appellate court, which in part said: "The declaration, in our judgment, states a good course of action. There is full proof that railroad companies do require such clearance cards before they will employ men coming from other roads, 'which proof' the court says, 'warranted a jury and the court below in finding as a matter of fact that the usage or custom to demand the presentation of such cards before employment, are general as to all roads, including the defendant.'"

In an opinion filed by Judge Jackson in special term of the superior court of Cincinnati, in which he holds that the ordinance wherein the board of legislation of Cincinnati sought to delegate to the city clerk the power to appoint a superintendent of the city hall with authority in the superintendent to appoint all subordinates, is invalid and the appoint-

ment of Robert Lillard as such superintendent, is therefore without effect.

Judge Jackson is of the opinion that the legislature, in enacting the new city charter of 1894, intended as the organic law for the government of the city that there should be a distinct separation of the executive and legislative functions, and that the board of legislation should be a purely legislative body, and that the power to appoint to offices generally should be imposed in the chief executive of the city in accordance with the recognized theory of American institutions. No sufficient authority is found for the theory of the defense that the authority vested in the mayor by section 1711 Revised Statutes, to appoint "to every office created by law or ordinance shall be made by the mayor," does not repeal section 256, of the act of 1869, expressly conferring upon the board of legislation the power to appoint a superintendent or architect. Whence it follows that if the board did not have the power to appoint the superintendent because that power was vested in the mayor, its action was void; and if it did have such power of appointment, if still its action is void for the reason that it did not exercise the appointing power itself. A motion for a temporary restraining order was granted.

#### PROSECUTING ATTORNEYS.

The annual meeting of the State Association of Prosecuting Attorneys was held in Columbus last week. After the transaction of its regular business, the following officers were elected for the ensuing year:

President, C. E. Sumner, Lucas county.

First Vice-President, E. C. Hecox, Meigs county.

Second Vice-President, T. W. Philips, Licking county.

Secretary and Treasurer, George Tarbell, Brown county.

These gentlemen also constitute the executive board. Toledo was selected as the place for holding the next convention. The date is to be fixed by the executive board, but it is to be the same week that the State Bar Association holds its annual meeting at Put-in-Bay.

This was done for the reason that a great many of the prosecutors are mem-

bers of the State Bar Association, and as they always attend the state meeting of the association, it was deemed advisable to make the matter of expense as light as possible.

A resolution was passed instructing the different prosecutors to consult with the members of the legislature from their districts as to the practicability of extending or changing the term of the office of prosecuting attorneys, so that their terms shall expire on September 1, instead of January 1, as at present.

Among the prosecutors present were:

Thomas W. Philips, Licking county.

John W. Higgins, Jackson county.

Charles A. Reid, Fayette county.

Joseph H. Dyer, Franklin county.

C. E. Sumner, Lucas county.

Henry O. Williams, Franklin county.

E. C. Hecox, Meigs county.

James Tarbell, Brown county.

Otto Pomerene, Stark county.

E. D. Howard, Franklin county.

Thomas N. Darby, Hamilton county.

Henry Bannon, Scioto county.

George Cogner, Delaware county.

#### OHIO STATE BAR ASSOCIATION.

The eighteenth annual meeting of the Ohio State Bar Association will be held at Hotel Victory, Put-in-Bay, July 20-23, inclusive. The program is as follows:

Tuesday, July 20, 2:30 P. M.—The meeting will be called to order by Hon. J. D. Sullivan, chairman of the executive committee.

Annual address by the President, Hon. Geo. K. Nash.

Report of committee on admission and election of members.

Report of Secretary.

Report of Treasurer.

Report of standing committees, as follows:

(1) Executive; (2) Judicial administration and legal reform; (3) Legal education; (4) Grievances, and (5) Legal biography.

President's call on judicial districts for the names of deceased members.

Memorials and remarks on deceased members. Evening session. Social.

Wednesday, July 21, 10:00 A. M.—Address: Memorial on the late Judge Henderson Elliott. Hon. John A. McMahon, Dayton.

Report of special committee. Special committee to present to the supreme court changes in the method of examination and requirements for admission to the bar.

Discussion on reports of committees.  
2:30 P. M.—Annual address, by Hon. Lawrence Maxwell, Cincinnati.

Discussion on reports of committee. Evening session. Social.

Thursday, July 22, 10:00 A. M.—Selection of members of committee on nomination of officers, and of standing committees. Discussion on reports of committees, and any matters members desire to bring before the association.

2:30 P. M.—Address: "Construction—Some of its uses and abuses." Hon. F. E. Hutchins, Warren.

Report of committee on nomination and election of officers.

Appointment by the president of three delegates to the American Bar Association.

Discussion on addresses.

Friday, July 23, 10:00 A. M.—Election of standing committees.

Unfinished business.

Miscellaneous business.

The executive committee reserves the right to make such changes in the foregoing programme as may be deemed advisable.

Attention of members is invited to the constitutional provision on dues.

The executive committee will meet at Hotel Victory, on the Island, at 8:00 P. M. July 19.

It is suggested that all other standing committees meet at the same place at 9:10, A. M. July 20.

The Hotel Victory will be the headquarters of the association.

By order of the executive committees.

J. D. SULLIVAN,  
Chairman.

GEO. W. CARPENTER,  
Secretary.

#### JUSTICES OF THE PEACE.

An interesting opinion was handed down last week by director of law Owen, of Columbus, which involved the authority of the city of Columbus to audit the dockets of the justices of the peace; also as to the official relationship the

justices sustain to the city administration. The opinion is as follows:

*Edward Denmead, Director of Accounts:*

DEAR SIR: I have your request for an opinion concerning the accountability for fees collected by justices of the peace within this city and your authority to audit their accounts, etc. It is not a question whether they are city officers. They are elected for Montgomery township. The geographical limits of the township and of the city are co-extensive. Technically justices of the peace are township officers. The question which concerns your department is whether they are accountable to the city like city officers and whether you, as director of accounts, may audit their accounts, etc.

Section 43 of the charter of Columbus provides that you shall, upon the death, resignation, removal or expiration of the term of any officer audit his accounts and if he be found indebted to the city immediately give notice thereof to the council and the corporation counsel and the latter shall proceed forthwith to collect the same.

The question is fairly debatable whether this provision is not confined to those who are strictly city officers.

A solution of this question is not necessary to a determination of the question you submit. It is enough for you to know that it relates to any officers who are accountable to the city and over whose accounts you are given supervision, with power to audit, etc. Section 621c. Bates's statutes, provides that each justice of the peace in this city shall receive in lieu of all fees, a salary of \$1,500, payable out of the city treasury. It also makes it his duty to collect all fees due and make return of them under oath to the city treasurer. Provision is also made for other acts of accountability to the city.

Section 9 of Judicial Article (iv) of the constitution ordains that the powers and duties of justices of the peace shall be regulated by law. It seems clear that, although they are technically township officers, it is competent for the general assembly to provide that they shall be accountable to the city for fees and

that the city shall pay their salaries, etc.

This being so, the city has an interest in the fees collected by them.

Section 38 of the city charter makes it your duty "to keep accurate accounts \* \* \* of all moneys due to, and of all the receipts and disbursements made by the city, or on its behalf," etc. By the same section, you are required "at the end of each fiscal year, and oftener, if required by the council, to audit accounts of the several departments and officers, and to audit all other accounts in which the city is concerned," etc.

Fees and costs collected by justices of the peace become the property of the city. They therefore and thereby pass within the power of control by the city council. In my opinion this fact renders you subject to the control of the city council as far as your action may concern the revenues of the city consisting of fees collected or collectable by justices of the peace within the city. For this purpose and to this extent they are, in every practical sense, city officers. The council has acted in this matter by resolving that they proceed to examine the books and audit the accounts of justices of the peace within the city and report the result to the council. In my opinion this action of the council is valid.

Respectfully submitted.

SELWYN N. OWEN,  
*Director of Law.*

#### SUNDAY BASEBALL.

Judge Ong of the Cuyahoga common pleas last week handed down an interesting and important decision regarding the legality of Sunday baseball in Cleveland. It will be remembered that when the Cleveland base ball team attempted to play ball in Cleveland on Sundays they were immediately arrested, and shortly after, a conviction was secured in police court. An appeal was immediately taken to the common pleas, and that court held that the law prohibiting the playing of base ball on Sunday was unconstitutional. Judge Ong's opinion is as follows:

"Many grounds of error are assigned and nearly all earnestly contested, but it

is urged by the plaintiff in error that the statute, to wit, section 7082a, under which the arrest and prosecution was had, is unconstitutional and void. The court, in looking over the record in this case, finds that a demurrer was by the plaintiff in error filed to the information charging him with a violation of the section of the statute above quoted, which demurrer was overruled in the court below, to which ruling the plaintiff in error excepted.

"As we have said, many grounds of error have been assigned, but the one raised by the filing of the demurrer and the overruling of which is assigned as error in this case, is, of course, conclusive of the case, if the contention of the plaintiff in error is correct or well taken, and the holding of the statute in this case unconstitutional and void would, of course, reverse the cause and discharge the accused as well as render it unnecessary to give any attention to the many grounds of error assigned in other respects during the proceedings below. And whilst the court has canvassed very thoroughly the whole of the errors assigned, together with the entire record in this cause, we are disposed to pass upon the constitutionality of the statute in question, and that error alone.

"It will be observed that section 7082a provides that 'whoever on the first day of the week, commonly called Sunday, participates in or exhibits to the public with or without charge for admittance, in any building, room, ground, garden, or other place in this state, \* \* \* any base ball playing, he or she shall, on complaint made within twenty days thereafter, be fined in any sum not exceeding one hundred dollars, or be confined in the county jail not exceeding six months, or both, at the discretion of the court.' It is perfectly apparent to the mind of the court, and we think it must be to everyone learned in the law, that such a statute must and does rest for its validity on one of two predicates, to-wit: It must either be unlawful or an offense to play or exhibit base ball on Sunday because it is Sunday, or it must rest, in order to be an offense, upon the fact that it is an immoral game or exhibition falling clearly within the police power or regulation, and, therefore, a crime and a

violation of its provision punishable as therein provided.

"Can the statute, then, be upheld and is it a constitutional act as resting upon the predicate that it is unlawful and a crime to play base ball, or exhibit the game of base ball, on the first day of the week, commonly called Sunday, because it is Sunday? It is not a crime to play base ball on Monday, or any other day of the week. Hence, if it rests upon the fact or is made a crime because it is played on Sunday, or on the first day of the week, commonly called Sunday, then it is clearly in conflict with the constitution and cannot be upheld, because the doctrine is well settled, and especially in Ohio, that all statutes which inhibit common labor, statutes that refer to the first day of the week, commonly called Sunday, are not enacted or enforced to compel the observance of that day as a day of religious worship, but as a day set apart by the statutes of Ohio as a day of rest. And while the court is well aware that a large majority of the people believe and think that the statute inhibiting common labor, or inhibiting certain acts on the first day of the week, commonly called Sunday, are statutes enacted and enforced because it is Sunday, nevertheless, as the court has indicated, there is no proposition of law so well or more clearly and thoroughly settled in Ohio, and I believe now in every other state in the Union, that no such statute is enacted or enforced, or can be enacted or enforced, because of the fact that it is the first day of the week, commonly called Sunday, or because that day is generally observed as a day of religious service, but such statute law is enacted purely and solely for the purpose of observing at least one day in the week as a day of rest authorized by law that all mankind may have one day of rest in seven.

"To make it perfectly clear, no statute could be upheld under our constitution for one moment that required the people of the state of Ohio to attend any kind or any form of religious service on the first day of the week, commonly called Sunday, or any other day of the week. Such an act would be clearly in violation of the spirit and language of the organic law of the state, but no more so than would be a statute which undertakes to

make the omission or commission of an act a crime because it is done or omitted to be done on the first day of the week, commonly called Sunday, and because it is Sunday. As the court has said, all such acts and statutes must and do rest in the fact that the legislatures of the different states of the Union have undertaken to set apart one day of the week as a day of rest. It must, therefore, be conceded that if the legislature undertook to say, as it seemingly did in this case, that to play or exhibit the game of base ball on the first day of the week, commonly called Sunday, because it was Sunday, would be enacting a statute in violation of the constitution of the state and would, therefore, be void. So, the present act cannot be upheld on the theory that it is a crime to play or exhibit the game of base ball on Sunday because it is Sunday.

"Again, if the power did exist to enact the statute under consideration and inhibit the exhibition of playing of base ball upon the first day of the week, commonly called Sunday, then it would be clearly void because it makes no exception in behalf of that class of people who conscientiously observe the seventh day of the week as Sunday, or Sabbath. The supreme court of Ohio have two or three times very distinctly declared that a statute providing for the observing of the first day of the week, commonly called Sunday, as a day of rest, is void and unconstitutional unless it contains a provision exempting those who conscientiously observe the seventh day of the week as Sunday for the operation of the statute. No such exception or provision is made in this statute, and upon that ground would be clearly void for the want of such exception as repeatedly held by the supreme court of Ohio. We are, therefore, clearly of the opinion that the statute under consideration cannot be upheld or enforced upon the theory that base ball is prohibited from being played or exhibited on the first day of the week, commonly called Sunday, because it is Sunday.

"Can it be upheld and sustained in this case because the act inhibited, to wit, that of playing or exhibiting base ball, falls within the police power or

regulation? It is fundamental that all acts, whether acts of omission or commission falling within the broad power of police regulation under the constitution, must be something in the nature of a nuisance, is, in fact, immoral, or has an immoral tendency; or is an act that tends to interfere with a fair administration of the law or preservation of the peace or is detrimental to the good or welfare of the whole people. Will it be contended for one moment that to play or exhibit the game of base ball, as it is understood and, in fact, played or exhibited to-day in Ohio falls within the provision of the general definition above given of police regulation or police power? We are clearly of the opinion that it does not. It will be observed, by reading section 7082a, that the reference therein made to playing or exhibiting of any base ball playing, or any ten pins, or other games of similar kind or kinds, is classed and grouped in the section with numerous games and acts well known as immoral and immoral tendencies clearly falling within the definition of the police power and regulation. Whether the legislature of Ohio may or may not enact or place upon the statute books a section that would be constitutional and valid as inhibiting the playing of base ball on the first day of the week, commonly called Sunday, we are not called upon to say; but clear it is to the mind of the court that the statute as it now exists and enacted and grouped among a lot of immoral games, such as gambling, sale of intoxicating liquors, etc., that the provision therein referring to the game of base ball is unconstitutional and void, and does not fall within the definition above given and understood in this day and age of the world as a police power and regulation. As above indicated by the court, if this statute is to be upheld and enforced as a valid and subsisting statute, it must be upon one of the two grounds above stated. And we think it cannot be upheld upon either, and, therefore, the act inhibiting the playing and exhibition of base ball on Sunday in Ohio is unconstitutional and wholly void and of no effect.

"The court having reached this conclusion in passing upon this statute ren-

ders it entirely unnecessary to give to this record any consideration as to the other errors assigned. And the court being of the opinion as stated herein, that the act under which the plaintiff in error was arrested and prosecuted and convicted in the police court is unconstitutional and void, it follows that the police court erred in overruling the demurrer to the information. And for that error, the judgment of the police court is reversed and plaintiff in error discharged, and judgment rendered against the city for all the costs of the proceeding."

### SUPREME COURT OF OHIO.

#### Official Record of Proceedings.

#### New Cases.

New cases filed in the supreme court since June 30, 1897.

5627. Charles M. Miller et al. v. The B. & O. R. R. Co. Error to the circuit court of Licking county. J. A. Flory and C. W. Miller, for plaintiff.

5628. Thomas J. Gladwell v. Elizabeth Holcomb et al. Error to the circuit court of Lucas county. A. W. Eckert, for plaintiff.

5629. The Cleveland City Ry. Co. v. Carl A. Militzer. Error to the circuit court of Cuyahoga county. Squire, Sanders & Dempsey, for plaintiff. Kerruish, Chapman & Kerruish, for defendant.

5630. The State of Ohio v. Harry Marton, alias Jim Anderson. Error to the common pleas court of Franklin county. Joseph H. Dyer and F. S. Monnett, for plaintiff.

5631. T. B. Townsend v. Fred. Harrison. Error to the circuit court of Wood county. R. B. Moore, for plaintiff. Troup & Dunn, for Defendant.

5632. The Louisville Trust Co. Assn. v. Leon Black et al. Error to the superior court of Cincinnati. Harmon, Colston, Goldsmith & Hoadly, for plaintiff. J. Shrode and Stephens & Lincoln, for defendant.

5633. The Pennsylvania Co. v. William M. Trainer, Admr. Error to the circuit court of Jefferson county. J. Dunbar, J. R. Cary and W. C. Boyle, for plaintiff.

5634. The Prudential Ins. Co. v. Mary McCullam. Error to the circuit court of Cuyahoga county. Meyer & Mooney, for plaintiff. Hart & Canfield, for defendant.

5635. Thomas J. Rathmell, executor, v. William C. Shirey et al. Error to the circuit court of Franklin county. Frank Rathmell and Berry Jewett, for plaintiff. John J. Crosbie, for defendant.

5636. Matilda Ettinger v. F. E. Tracy, trustee, et al. Error to the circuit court of Richland county. Donnell & Marriott, for plaintiff. Jenner, Jenner & Weldon, for defendant.

# The Franklin T. Backus Law School

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# Ohio Legal News.

A Weekly Legal Paper Published by  
**THE LANING PRINTING CO.,**  
 NORWALK, OHIO.

EDITED BY J. F. LANING.  
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## OHIO STATE REPORTS.

Volume 54. **Ohio State Reports**, is now ready for delivery, and may be obtained at \$1.50 per volume, payable in advance.

An electric railway company is not bound by its employees' practice of slackening the speed of a car to enable a particular passenger to alight at a point where no stop is ordinarily made, so held in *Jagger v. People's St. Ry. Co.*, (Penn.), 36 Atl. Rep., 867.

In the case of *Helen Kemper v. The Village of St. Bernard*, recently decided by the Hamilton circuit court, the question raised in this case was whether an assessment for street improvements of more than twenty-five per cent. of the value of the property after the improvement was made could be collected from the present owners, who did not sign the petition for the improvement. The lots at the time the improvement was made were held by a lessee, who signed for the improvement and afterwards defaulted and the lots were offered for sale and bought in by the owners of the fee, the plaintiffs in the present case.

Judge Smith prepared the opinion, in which he held that the lessee in signing for the improvement could only represent his own interest in the property, and not that of his lessors, and that the latter were not bound by his act in signing the petition.

## A NEW LAW FIRM.

Campbell & Schoen is the name of a new law firm formed in Cleveland recently. The offices of the new firm will be located in 420, Society for Savings building.

O. J. Campbell was formerly a partner of Ex-Judge Hutchins, present postmaster of Cleveland. Jacob H. Schoen, the junior member of the new firm, read law with Hutchins and Campbell, after having first spent three years at Harvard, and finally graduating in 1894. After which he entered the Western Reserve Law School, of Cleveland, and having studied law in that institution for one year he

became bailiff to Judge W. C. Ong, of the Cuyahoga common pleas, serving in that capacity until July 1, at which time the present firm was formed. Mr. Schoen was admitted to the bar in March 1897.

### OHIO STATE BAR ASSOCIATION.

#### Annual Meeting at Put-in Bay.

The eighteenth annual session of the Ohio State Bar Association opened at Put-in Bay, on Tuesday of this week. It was held at Hotel Victory, one of the most appropriate places imaginable for an occasion of this kind. There were about two hundred lawyers in attendance, many of whom had with them members of their families, and it was a very enjoyable event. This is more than are usually present; many new members were enrolled this year, and among them were many who expressed themselves that the pleasure of the meeting was such that they regretted much that they had not attended before. The rank of the members of the bar in attendance was high, and although in numbers the meeting might have been larger, it was a high class gathering, fully representative of the best of the Ohio bench and bar.

The meeting was presided over by the president of the Association, Hon. Geo. K. Nash of Columbus. His annual address will be found in this issue of the NEWS.

On motion of Hon. John F. Follett, the following resolution was passed, in memory of Hon. Randolph Tucker of Virginia, who was the guest of the association last year, and delivered the annual address.

The Hon. John Randolph Tucker, who so kindly favored us one year ago with an annual address which fittingly illustrated his eminent character and masterly ability, having departed this life, this Association avails itself of the first opportunity to express its profound sorrow and deep regret at the loss to the legal profession of so profound and eminent a lawyer and so learned and distinguished a teacher of the law; to the country, of a statesman whose long career in public life was characterized by

keen appreciation of those measures and policies best promotive of the public welfare, and unswerving integrity and exalted patriotism in the discharge of official duties; and to the citizen, of one whose life in all its relations was pure and spotless and devoted to purifying and exalting his fellowmen.

*Resolved:* That this Association hereby tender to his bereaved family, to the Bar and people of his beloved state of Virginia and to the people of our whole country, our sincere sympathy and condolence at the great and irreparable loss caused by his death.

The remainder of the afternoon session was taken up with reports of officers and standing committees. The report of the secretary, H. B. Arnold, Esq. of Columbus, occasioned considerable discussion. It called attention to complaints that too many prominent lawyers in the state do not belong to the association and that recommendations of the association do not have that weight with the legislature which they should have. The secretary insisted that the membership of the association should be increased and that its work should be made more effective and suggested remedies. His criticisms were approved by a vote of the members.

Considerable talk was indulged in over the items of expenditure incurred for the payment of the expenses of the committee on Legal Administration and Reform, and the Executive Committee, but they were sustained by the association.

Obituaries were read on Judge W. J. Gilmore, Columbus; Channing Richards, Cincinnati; Judge Charles J. Scribner, Toledo; James Scroggs, Bucyrus; Judge M. H. Clarke, Chillicothe.

The second day's session of the association was better attended than the first, there having been additional arrivals of members and their friends.

The memorial on the late Judge Henderson Elliott, which was to have been delivered by Hon. John McMahon of Dayton, was not given, as the gentleman was unavoidably absent, and arrangements were made to have it printed in the minutes.

The report of the special committee to present to the supreme court changes in the Method of Examination and Re-

quirements for Admission to the Bar, was read by Mr. Patterson of Columbus, and after being discussed was adopted. It is quite long, and will be printed by us next week.

Several matters in the report of the committee on Legal Administration and Reform were referred back to the committee for report again next year.

In the afternoon the annual address of the Association was delivered by Hon. Lawrence Maxwell, of Cincinnati, U. S. Solicitor.

The address proved the main feature of the occasion. It treated of legal reform in its various phases, both as applied to law and lawyers. While lawyers were not called upon to assume the role of reformers the bar which they represented was nevertheless responsible for delays and delinquencies in legal administrative justice.

He dwelt upon the importance of a through liberal education, both in university branches and legal studies, for those contemplating admission to the bar and advocated a public examination of candidates for membership before the supreme court.

A highly entertaining and sensible address on "Construction—Some of its uses and abuses" was delivered by Hon. F. E. Hutchins, of Warren. This and Maxwell's address will be published by us next week.

The officers of the Association for next year will be Judge Judson Harmon, president, Harry B. Arnold, Esq. of Columbus, secretary, and Judge L. H. Pike, of Toledo, treasurer.

#### ANNUAL ADDRESS OF THE STATE BAR ASSOCIATION.

[Annual Address of the President, Hon. Geo. K. Nash, before the Ohio State Bar Association, Put-in-Bay, July 20, 1897.]

*Gentlemen of the Ohio State Bar Association :*

In calling your association together for its eighteenth annual meeting, I find my first opportunity to express to you my gratitude for the honor you conferred, in electing me as your president. This very great kindness, coming from breth-

ren whom I love and respect, is one of the flowers, whose fragrance and beauty tend to make bearable, a life which is not wholly free from thorns, that wound, and sorrows, that sadden the heart. For this oasis, which my memory will ever cherish, I thank you.

I wish also to congratulate you upon the fact that we again assemble upon this beautiful island, after a year of toil in our chosen profession. To some, it has been a year of sorrow. To very many, it has been a year of happiness. To all, I hope, it has been a year marked by some degree of success. In these groves, encircled by the calm waters of Lake Erie, we will again hold communion with each other. To those who have had sorrow, we will give aid and comfort by the affectionate warmth of our greetings. With those who have added new luster to their fame by hard earned success, we will rejoice. From these councils we will again go to our homes, refreshed and re-invigorated for the work of the future, with great friendship for each other, with renewed faith in the integrity of the lawyers of Ohio, and with a firm determination to hold aloft the standard of honor which has ever distinguished our profession.

It gives me pleasure to say to you that, in so far as I have observed, your officers and committees have, during the last year performed well the duties which you entrusted to them. The committee on Judicial Administration and Legal Reform has held two sessions in Columbus, lasting several days, considering important measures which will be brought to your attention and which deserve, and will, I am sure, receive your careful and discriminating consideration.

The only session of the general assembly of Ohio within the next two years will begin in January next. If any changes in the laws of Ohio, worthy of the support of this Association, are needed, it is our duty now to formulate them and to prepare to take efficient action. For this reason the Executive Committee has provided for a four days' meeting, instead of three days, as has been customary, and has provided fewer addresses than usual. In this way ample time has been given, as it is hoped, for your deliberations

## HON. J. RANDOLPH TUCKER.

Last year we were honored, delighted and instructed by the address of Hon. J. Randolph Tucker, of Virginia. His theme was "The constitution of the United States." In apt words, he recalled the dangers and difficulties which threatened its creation. He showed the wisdom therein contained, and the guaranties which it gives to the lives, property and happiness of a free people. He refreshed our memories on the dangers which have imperiled it during the existence of the Republic, and pointed out those which might jeopardize it in the future. He pronounced it "the best product of political science for the security of man," and invoked from us the purpose to do our utmost to save and uphold our federal system, and avert the perils, which menace it, as the best and highest duty we owe our common country. Thirty odd years ago, our country was divided into two hostile camps,—one using all its might and power to destroy that system, and the other, being equally zealous, in its defense. In the first camp was then to be found our distinguished orator. Last year, he besought us with an earnestness that could not be resisted, to love, obey and defend that system in all time to come. That he did this, was very pleasing to every person who listened to his words of wisdom and patriotic advice. It assured us that the animosities of our great civil war are forever buried,—that we are, in fact, a reunited people,—all loving the great constitution, which protects us and the beautiful flag, which floats over all our land, the emblem of peace, happiness and liberty.

During the year, our friend has passed from earth, and has been gathered to his fathers. As a testimonial of our esteem for him as a man, a lawyer and a patriot, I suggest, that we adopt an appropriate resolution. By so doing, we may minister consolation to a widow's heart, and add to the pride, which the children justly have in the memory of an honored and a most honorable father.

## UNCONSTITUTIONAL LAWS.

Among the evils we should guard against, is the enactment by the legisla-

ture of laws which are in conflict with the constitution of the State. Many such measures are presented at each session of that body and sufficient care is not exercised to keep them from becoming a part of our statute books. Frequently they are partisan schemes and are urged with partisan zeal. Still more frequently they are intended for the making of some local improvements, for which money is to be raised by issuing bonds,—ultimately to be paid by the people. Such laws burden our courts to the very great detriment of the legitimate business, which demands their attention. They sometimes inveigle unwary investors and holders of trust funds, having faith in the intelligence of our legislators, into investing money,—perhaps the savings of a life-time,—in worthless securities. Every unconstitutional law causes the people to lose confidence in the wisdom of the fundamental law of the state, which confidence is necessary to their contentment.

Possibly this subject does not require the action of this body, as an association, but it certainly demands our attention as individuals and as lawyers. Every attorney, who is honored by being made a representative of the people in the general assembly, should set his face, like flint, against legislation of this character, no matter how strong may be the pressure and how urgent may be the plea that it is only a "local bill." Those of us who are not thus honored, should talk with our friends who are legislators and impress upon them, if possible, the magnitude and far reaching effect of this evil.

## CORPORATIONS.

In the secretary of state's office there are seventy-six large volumes of records, in which are recorded the certificates of the twenty-two thousand six hundred and forty corporations organized in Ohio, since the adoption of our new constitution in 1851. Before that time, corporations were created by special acts of the general assembly. The number thus brought into existence was about thirty-two hundred and forty. Now they may be created for any purpose for which individuals may lawfully associate themselves

except for carrying on professional business. These bodies, except insurance companies, railroad companies, building and loan associations and certain banking companies are practically under no restraint by the state and make no report to her officers. Large mining, manufacturing, commercial and other enterprises are carried on by and through them. Because they are created by the state, and possess certificates bearing the imprint of her seal, people are led to believe that they are safer to do business with, and are more entitled to credit, than are private partnerships and individuals. In very many cases they are less worthy of confidence. They are authorized by the state to do business, before one dollar of the capital stock has been paid. In regard to these artificial beings of her creation, the state owes a duty to the public. Before she gives them her approval and permits them to do business, she ought to require that a very large per cent of, if not all, their capital stock be paid in money, and invested in the business they propose to transact. There is no trouble in this being done. This is demonstrated in the case of insurance companies. No one of them can proceed until the state knows that the capital stock is paid in and how it is invested.

I contend that the state should go further and require these companies to make annual reports to be filed with and be inspected by some responsible officer. This report should show, among other things, how much of the capital stock has been paid, how the money is invested, what the assets are, the amount of liabilities, and the names of the stockholders. In fact, there should be such a record of every corporation, that the public may know at all times, whether it is worthy of credit and confidence. Corporations have advantages which have been given to them by the state. In return for these benefits, they should be willing that their transactions be an open book, so that we may know what they are, and who they are. This much they owe the state. This much the state ought to require from them, because they are her creatures, and she has given them her approval. If these regulations had existed in the past, our common-

wealth would have been strewn with fewer corporate ruins and her people would not mourn the loss of so many millions of dollars invested in worthless concerns, bearing the commission of the state to do business. Such regulations would be to the advantage of sound companies and a protection against irresponsible ones.

#### RAILROAD COMPANIES.

Investments in the stock and bonds of railroad companies, have been a prolific source of loss to all our people and the outlook, for the future, is not reassuring. By reference to the last annual report of the Commissioner of railroads and telegraphs, we learn that the total amount of the stock of Ohio railroads, outstanding, is \$641,613,786,—also, that the funded debt of these companies is \$756,617,247,—a total of \$1,398,231,033.

What amount of property is there behind these securities, to make them good? We have 3,934 miles of railroads. Each mile is stocked and bonded for more than one hundred and fifty-six thousand dollars, and is bonded alone, for more than eighty-four thousand dollars. We all know that railroads in Ohio are not worth any eighty thousand dollars per mile, to say nothing, of one hundred and fifty-six thousand dollars. All the railroad property in the state is appraised for taxation, at about one hundred and five million dollars. This is much less than its real value. If its actual value was to be estimated at three hundred million dollars, it would probably be, not far from the truth. When we face these facts, we must conclude that, except in rare cases, the stock has no value, and that, the bonds of very many railroads have no adequate security behind them. In many cases, the bonds are almost as worthless as the stock. It is not strange that many railroad companies in Ohio, after hard struggles and persistent energy by their officers, are unable to earn money enough to pay the interest upon the bonds. It is not surprising that many of these companies are now in the hands of receivers, appointed by the federal and state courts.

The injury, arising from these conditions, is not alone, in the fact that the

people of Ohio have lost very large sums of money. We need the capital of men from other states and from foreign countries, with which to build, keep alive and operate these great enterprises. The experience of such men with Ohio railroads has not been such as to encourage them in making other investments with us. The wonder is, that they have not long since abandoned the state.

The thing for us to determine, is whether these wrongs have come, in part at least, from the laxity of our laws. If they have, it is the province and the duty of this association to use its influence in correcting them. One province of our statutes is, that a railroad company shall not borrow money and issue bonds in excess of the amount of its capital stock. I would provide, that it shall not borrow money and issue bonds in excess of the amount of money, paid by the subscribers to, or owners of the capital stock. I would go further, and enact that no money should be borrowed until the funds received from the stock, have been actually expended in the construction of the proposed railroad, and this fact certified to by some proper and competent officer of the state.

Under our law as it is, the custom has been for the projectors of railroads to secure little or no money from the capital stock. The first step, after securing a certificate of incorporation, has been to issue bonds. When these bonds are sold, many times the stock has been given to those who bought them, and as a part of the consideration for the purchase. Sometimes a construction company has been organized, and the bonds and capital stock given to it, as a consideration for building the road. Thus it has happened, that in Ohio, there is, in many cases, nothing behind the bonds of railroad companies as security, except the property, which has been created by the bondholders' money, and to our shame, be it said, many times has this money been most improvidently expended.

If the plan which I suggest, had always been the law in Ohio, and had been rightly enforced, the security for the bonds issued by railroads, would be, not only the property created and purchased by the money borrowed, but also the property created and purchased by the

money paid by the stockholders. If all this money had been prudently and honestly expended, our railroad bonds would to-day be among the best and safest investments in the world—not only this, but railroad stocks would have a real and actual value. Railroads would now be able to conduct their business and charge rates for passengers and freight, which would more nearly meet the present needs of our people.

I think I hear some one say, "you propose to lock the barn door after the horse has been stolen." Not so! The only way out of our difficulties is by processes of reorganization. The holders of railroad stocks and bonds must realize the fact that they have lost, if not all, at least a large portion of their money, and consent to a scaling down of their stocks and bonds, until they are supported by sufficient property to make them good. They must realize the fact, that they are just as rich, if they hold a piece of paper, labeled ten thousand dollars, and worth ten thousand dollars, as they are if they have a piece of paper, marked fifty thousand dollars, but in fact, worth only ten thousand dollars. Some such measure as I have suggested is necessary, in order that the reorganized companies may be on a sound basis.

Again, we will need other railroads in Ohio. Let us profit by the sad experience of the past. They should be built upon honest, sound, business principles, so that investors may get a fair return for their money, and not for the purpose of enriching their promoters.

#### THE OBJECT OF THIS ASSOCIATION.

The purposes sought to be attained by the organization of this association, are well and succinctly stated in our constitution. They should always be kept in memory by us. They are "to advance the science of jurisprudence, to promote reform in the law, to facilitate the administration of justice, to uphold integrity, honor and courtesy in the legal profession, to encourage thorough, liberal, legal education and to cultivate cordial intercourse among the members of the bar."

The science of jurisprudence is a knowledge of the laws, customs and

rights of men, necessary for the due administration of justice. How important this is, is fully realized by all lawyers. A country is not worth living in, in which justice is not administered. Without it, the rights of property are of no value. Without it, the rights of men are not worth consideration. In the country where it is best administered, the right to property, the right to liberty, and the right to life, are the most secure, and the people are the most happy. What nobler, better ambition can we, the ministers of the law have, than the desire to advance this great science.

To say that no reform in the law is needed, is to make the proud and untrue boast that we have reached perfection. To say that the law to-day is no better than it was two hundred years ago, is to admit that we have made no advancement, while all the rest of mankind have made giant strides on the road of progress. To claim that there will be no improvement in the law, within the next two hundred years, is to aver that we are to be sluggards, while all the rest of the world is advancing in knowledge. How important it is then, to promote reform in the law.

The speedy administration of justice is just as important, as it is that it should be meted out at all. Justice long delayed is but a delusion and a snare. Rights of property long deprived of, are of little value. Wrongs long unpunished are wrongs still. To be wrongfully deprived of liberty and without vindication, is an injury which cannot be requited. A community in which this state of affairs exists, will soon become the home of those who do not love the law, and the pest-house, wherein anarchy, and all isms, dangerous to the rights of man, are bred. If we love our country, and law, and order, we should be ever zealous in promoting the speedy administration of justice.

A lawyer without integrity, is the most despicable of all criminals. The man of but little intelligence, who commits a wrong, may be forgiven, but he whose whole training has been to teach him what is wrong and what is right, and then sins, is not worthy of sympathy. A lawyer without honor, is unmindful of

the oath he took when he was commissioned as one of the officers of our courts of justice. A lawyer without courtesy does not realize that his office is one of great dignity, and that those with whom he is in daily conflict are entitled to his consideration and respect. To promote integrity, honor and courtesy in the legal profession is but to defend the castle, which is our home.

For a successful lawyer, nothing is so essential as a thorough, liberal, legal education. For the lack of this education, great natural ability, unceasing industry and determination to succeed, will not compensate. The busy, successful lawyer must have the most varied knowledge, or he must have been so trained, as to have the power to acquire such knowledge whenever the occasion to use it may arise. When young men desire to enter our profession, we should encourage them to first acquire the most liberal education possible, and then to spend all the time necessary, and to use all the means possible, to secure a thorough, accurate, and comprehensive knowledge of the principles which underlie the law.

It hardly seems necessary that this association should have been formed to cultivate cordial intercourse among the members of the bar. No class of men know each other more thoroughly than the lawyers. Their life is a life of daily conflict. In this strife, we come to know our faults, but we also learn our good qualities and are taught to love and respect each other. Our relations are always cordial, much to the amazement of the ordinary mortal. But in these annual gatherings, wherein the lawyers of Ohio, and members of their families commingle, we see a different phase of our lives. I have observed that members, who have come here year after year, greet each other with greater and still greater attention as the years go by. Therefore, I conclude that the social feature of our association is one of great value.

For this association, with its noble purposes, I invoke a long life and a useful career, may it always be worthy of your love and have your hearty sympathy and support.

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A contract of a married woman valid by the law of the place where it was made, is valid and binding upon her, although by the law of her domicile she is prohibited from making a contract, so held in *Bowles v. Field* (U. S. C. C., Ind.), 78 Fed. Rep., 742.

The mere fact that the newspapers of a city where a murder was committed, continued to publish sensational articles in regard to the crime, and after defendant's arrest, both before and during the trial, treated him as the undoubted criminal, and aroused public sentiment strongly against him, does not alone show that he did not have a fair trial, and will not require the granting of a new trial, where satisfactory jury was obtained without defendant's having exhausted his peremptory challenges, and each juror makes affidavit that he neither read nor heard read any of the publications during the trial, and at all times obeyed the injunctions of the court, and was not influenced in any way by anything outside the evidence, and where it does not appear that defendant was prevented from making his full defense. *People v. Durrant*, (Cal.), 58 Pac. Rep., 75.

## EXAMINATION AND REQUIREMENTS FOR ADMISSION TO THE BAR.

[Report of M. R. Patterson, as a Special Committee of the Ohio State Bar Association, to present to the supreme court changes in the method of examination and requirements for admission to the bar. Submitted to the association, at its annual meeting, Put-in-Bay, July 21, 1897.]

## To the Ohio State Bar Association:

GENTLEMEN: The undersigned, having been appointed by this association at its last meeting, to present to the supreme court of Ohio the recommendations adopted by the association for the improvement of the rules of the supreme court of Ohio, in relation to the qualification, examination and admission of persons to the bar, begs to submit the following report:

Your committee reports that he caused said proceedings in reference to said rules to be printed in circular form, a copy of which is hereto attached, and mailed to each of the judges of said court a copy

thereof; that on December 28, 1896, he mailed a letter (of which the following is a copy):

COLUMBUS, OHIO, December 26, 1896.

HON. MARSHALL J. WILLIAMS, Chief Justice  
Supreme Court, Columbus, Ohio:

MY DEAR SIR: The enclosed circular will advise you of certain matters pertaining to amendments of the present rules of the supreme court, for the admission of members to the bar, specially committed to me for presentation to the court, by the Ohio State Bar Association.

Will you kindly advise me when I may meet the court to carry out the purpose of this appointment? An informal meeting, if agreeable, with such members of the court as may be in the city, during the present vacation, may expedite matters, or wholly subserve my purpose.

Yours respectfully,  
M. R. PATTERSON.

That on January 12, 1897, he received an answer thereto, of which the following is a copy:

SUPREME COURT OF OHIO,  
CONSULTATION ROOM,  
COLUMBUS, January 12, 1897.

MR. M. R. PATTERSON, Columbus, O.:

DEAR SIR: Replying to your communication of the 28th of December, I am directed by the judge to say, that they will hear you on the subject of your communication this afternoon at 3 P. M.

Very truly,  
MARSHALL J. WILLIAMS.

That pursuant to the appointment thus made, he appeared before the judges of said court, and submitted in writing a number of recommendations for the improvement of said rules, stating orally the reasons for the same. He offered his further services to the judges in any capacity desired by them designed to carry out the purpose and spirit of the action of this association in reference to the improvement of said rules. He has heard nothing from said court or the judges thereof in reference to said recommendations since so submitting the same, except as herein stated.

On the evening of the 26th of June, 1897, after said court had adjourned for the summer vacation, the undersigned met Judge Williams and asked what action had been taken on the subject of the recommendations in question. Judge Williams said he had laid the matter before the judges, but that no action had

been taken, further than that said recommendations had gone over for consideration at some time when the rules were to be taken up for revision.

Judge Shauck has since assured your committee that it is the purpose of the supreme court to take up the matter of the revision of the rules of said court before the end of the present year, and has expressed himself favorable to the adoption of the very best set of rules in reference to admission to the bar that research, judgment and experience can produce, to the end that the standard of professional qualification in Ohio shall not be inferior to that of any other state in the union.

The foregoing is, accurately speaking, all the report that can be made by your committee. But inasmuch as your committee was the cause of his own appointment, in so far that he introduced to the attention of this association the subject under consideration, by this report, he feels called upon to offer some further observations which, if not considered strictly pertinent to the report, may be charged up to his individual account as a member of the association, if there is anything to his credit for the silence he has generally maintained in the discussions and deliberations of this body.

As we have, in the manner stated, an indication of a purpose to revise the rules of the supreme court in relation to this matter, the undersigned is in favor of a vigorous renewal, through some regular committee of this organization, of the effort to have the supreme court adopt a set of rules in relation to the admission of applicants to the bar, which, for efficiency, shall be at least the equal of those in use in the states of New Hampshire and New York.

Pursuant to this purpose, and to aid in the discussion of this subject by the members of this association, a draft of rules embodying the principles suggested in the paper of a year ago and which, it may be added, are in substance the written recommendations left with the Judges of the supreme court by your committee, is hereby submitted as follows:

#### RULE XV

SEC. 1. Except as provided by section 560, Bates Statutes of Ohio in refer-

ence to persons who have been admitted and practiced law in the highest court of another state or in the supreme court of the United States for a period of five years, preceded by a preparatory study of two years, no person shall be admitted to the bar of Ohio, but upon the certificate of the standing committee that he has passed the examination of said committee.

SEC. 2. There shall be appointed to take effect on the first day of January, 1898, nine discreet and judicious attorneys and counsellors at law, to be known as the Standing Committee on Examinations, whose duty it shall be, under the direction of the supreme court, or two Judges thereof, to conduct the examinations for which provision is hereby, and by statute, made. The members of said committee shall be appointed for the following terms: Three members thereof for one year; three members thereof for two years; three members thereof for three years, and their respective successors to be appointed for a term of three years each.

SEC. 3. The Standing Committee will meet at the supreme court rooms at the state house in Columbus, Ohio, on the third Tuesday of June, and the first Tuesday of December of each year, for the examination of applicants for admission to the bar. No other examinations for admission to the bar will be held. Examinations must be conducted by at least five members of the Standing Committee, and each member present at such examination shall report in writing for or against the admission of the applicant.

SEC. 4. No applicant shall be admitted to the oath of office unless a majority of the examiners present at the examination shall certify that they find him to have a competent knowledge of the law, and to have a sufficient general learning to discharge the duties of an attorney and counsellor at law, and shall recommend his admission. And such certificate of the examiners shall not be made unless the applicant has sustained upon his written answers to the printed interrogatories of the examiners an average grade of seventy-five per cent. on an examination embracing the following subjects: The law of real and personal property, torts, contracts, evidence,

pleading, partnerships, bailments, negotiable instruments, agency, domestic relations, wills, corporations, equity, jurisprudence, criminal law, constitutional law, federal procedure and legal ethics; and also the following literary subjects: English composition, arithmetic, United States and English history; provided, that the examining committee may accept and substitute for the examination in the above literary subjects, a certificate properly authenticated, of having completed a full year's course at a college or university of good standing, a diploma of graduation from a city graded school, or a State School Examiner's teacher's certificate, which said certificate or diploma may be furnished at the time of taking the examination.

SEC. 5. Applicants for examination shall be deemed to have studied law within the meaning of section 560, Bates Statutes, and within the meaning of these rules, when they shall have complied with the following terms and conditions:

(a) Three full calendar years must intervene between the date of commencing to study law, and the date of the examination.

(b) Attendance at a law school of good repute and standing during a school year of not less than eight months in any year shall be deemed a year's study.

(c) Where there is an attendance at a law school of less than eight months in any year, there must be a study under an attorney for such period, as will make in all ten months of study for any such year.

(d) Study under the tutorship of an attorney for ten months in any year shall be deemed a year's study.

(e) Instruction whether given by an attorney or at a law school shall be personal instruction, and consist of at least ten (10) recitations or periods of instruction, of an hour each, on each legal branch herein named as the subjects of examination.

(f) It shall be the duty of every person resident of this state who enters himself as a student at law, on and after January 1st, 1898, under any attorney and counsellor at law, or at any law school, whether located in this state or elsewhere, to cause to be filed in the of-

fice of the clerk of this court, the certificate of such attorney, or the certificate of the chief officer of a law school, as the case may be, showing the name, age, residence, and the date when such person entered himself as a student at law, which said certificate shall be accompanied with a fee of one dollar. As to all persons resident of this state who shall commence the study of law on and after January 1st, 1898, the three years' study and preparation required by said section 560 shall date from the filing of such certificate.

(g) A person who has studied law in another state or country, but who has not been admitted to the bar of any state to reside, must, in order to get any credit for such study of the law, file in said clerk's office (1) an affidavit showing his name, age, present and former residence, the place or places where, and period of time, he has studied law; (2) the diploma of a law school if he has one; if not, the certificate of his former preceptor, or preceptors, showing the character and extent of his studentship, and testifying to his moral character and standing at such former residence, and (3) a certificate from an attorney located in this state, or chief officers of a law school, showing that he has entered upon a course of study since becoming a resident of this state, which said papers shall be accompanied by a fee of one dollar. The one year's residence in this state required of such persons by said section 560 shall date from the filing of such papers.

(h) A person residing or coming into the state for the purpose of making it his permanent residence, who has been admitted to the bar of another state, and been in active practice therein for a time which, added to his preparatory period of study, makes at least three calendar years, but who has not had five years' practice, as described in section 1 of this rule, shall, three months before being admitted to an examination, file in the office of said clerk (1) an affidavit declaring his purpose to become a permanent resident of this state, and stating his name, age, former and present residence; (2) his certificate of admission to the bar of such other state, which if issued less than three years before such filing, shall

also be accompanied by the certificate of his preceptor, showing the extent and character of his studentship, and his moral character, and (3) a certificate of a judge of a court of record where said person has been engaged in the practice of the law, showing the length of time such judge has personally known him: his moral and professional standing while at the bar of such other state, which said application and papers shall be accompanied by an examination fee of \$10.00, and a record fee of one dollar, which shall entitle him to have his papers examined, and to the conditions and privileges provided for by sections 9, 10 and 11, without further application.

(i) A person resident of this state who shall have entered upon the study of the law before the first day of January, 1898, shall, on or before the first day of March 1898, cause to be filed in the office of the clerk of this court the certificate of his preceptor, or the chief officer of a law school, where in attendance, showing his name, age, residence, time when, and place where, and under whom said person became a student at law, which said certificate shall be accompanied with a fee of \$1.00.

SEC. 6. If the filing of the affidavits, certificates and other documents, herein required, has been omitted by excusable mistake, or without fault, the court may order such filing as of the proper date.

SEC. 7. Except as provided by Section 5 (g) in reference to a person who has been admitted to the bar of another state, a student at law who desires to have his name enrolled for examination, must, not more than 60, nor less than 20 days, before the time herein fixed for examination, file in the office of said clerk his application for admission to the bar, giving his full name, age, residence and post-office address, and with such application must file the certificate of qualification required by section 560, or 561, Bates Statutes, as the case may require.

The certificate must show, in addition to the statutory requirements, that the applicant and his preceptor have devoted together, to instruction and recitation, at least 10 periods of time of an hour each, on each legal subject upon which an examination is hereby required. Where

the certificate of an attorney other than his preceptor, or the presiding officer of his law school, is produced, it must appear that the certificate of such preceptor or presiding officer of the law school, cannot for some satisfactory reason be had, and unless the applicant shall have commenced the study of law before January 1st, 1898, such certificate must show from personal knowledge of the certifier the length of time the applicant has been engaged in the study of law, and must show from personal examination his belief in the sufficiency of the applicant's legal knowledge.

SEC. 8. The certificate produced in conformity with the foregoing rules shall not be deemed conclusive evidence of the facts therein stated; but, in all cases, the court must be satisfied of its truth before the applicant will be admitted to an examination.

SEC. 9. The application and certificate above required must be accompanied with an examination fee of \$10.00, which \$10.00 will be returned to the applicant if his name is not placed on the examination roll, and which, if his name is so placed on the roll, will entitle the applicant to three examinations.

SEC. 10. After the expiration of the 20th day before such examination the court will make an examination of the papers filed by the applicant, and cause him to be notified whether he will be admitted to the examination, and if so admitted will cause his name to be placed on the examination roll, and delivered to the Standing Committee on Examinations.

SEC. 11. An applicant failing to pass an examination upon presenting himself again for examination, shall produce the certificate of an attorney or presiding officer of a law school that he has, in the interim, diligently pursued his legal studies.

SEC. 12. The Standing Committee may make rules not inconsistent herewith for the conduct of the examinations, which together with this rule, shall be published in pamphlet form for distribution by the Standing Committee.

SEC. 13. The clerk of this court will be provided with a record, in which he shall enter the date of the filing of all papers herein required by pertinent de-

scription of the same, and also a cash book in which he shall enter all sums received, from whom received, and the date thereof, and shall pay the same out on the order of the Chief Justice, in payment of the expenses, that is to say, the cost of necessary records, printing, and stationery; to the clerk of this court the fees herein charged and paid for filing certificates and other papers, which shall be in full of all services herein, and by law, required of him in connection with the admission of applicants to the bar; to each member of the Standing Committee attending an examination there shall be paid ten dollars a day as compensation, and four dollars a day for expenses, for the time consumed in traveling and attending such examination. If the funds are not sufficient for such purpose such pro rata distribution shall be made as the funds will warrant.

SEC. 14. Rule XV., heretofore made and published for the regulation of examinations, and the admission of applicants to the bar, and all additions thereto and amendments thereof, are hereby annulled and set aside, and the foregoing substituted and published as Rule XV. of this court.

These rules, at first blush, may impress you as being somewhat strict and burdened a little with detail. They are not, however, as exacting in the matter of detail as the New York rules and are, for such reason, less complicated. The cardinal principles involved in the discussion and adoption of the proposed rules are:

(1.) A committee of a more permanent character than has heretofore been maintained.

(2.) The abandonment of special committees for college students.

(3.) A literary qualification.

(4.) Registration of law students.

There are also some minor changes to be noted.

In the list of legal subjects upon which the examination is to be had "Torts" is substituted for "Personal Rights," under the present rules, for the reason that the subject of "Personal Rights" has been found by experience to be too general, and is largely included in the Constitutional Law. "Federal Procedure" is added to the

present list of legal subjects in deference to the recommendation of the American Bar Association, and the ample reason given in the printed proceedings thereof for the year 1895.

A change is made in the examination fee from five to ten dollars, and a meagre compensation is allowed the examiners for the discharge of their laborious duties. Under the present system, only expenses are allowed.

Some instruction and recitation is also required. This is especially directed to students of law offices, many of whom never recited in their lives, or received any regular instruction or drill from their nominal preceptors. A lawyer who permits one to enter his office as student should assume the burden and responsibilities of an instructor.

Referring to the principal changes proposed, I have nothing to add to the reasons given heretofore for having a single committee of a permanent character, further than that the evidence of the past year has emphasized the necessity for a change. That substantially all of the college students in the June examinations of this year should be admitted under *special committees*, and that two-thirds of a class of ninety examined by the *standing committee* should fail, cannot be explained, except, in a large measure, by unequal examinations. No lawyer who has not given the matter of the preparation of legal interrogatories careful thought, can on short notice take up a legal subject and develop the student's knowledge of its underlying principles within the compass of five or ten questions. Take for instance, partnerships. It is an easy matter to ask, and to answer, the question as between partnership and individual creditors who are to be first paid from the partnership assets. But to the question "May a partner of an insolvent partnership transfer his interest, with consent of his co-partners, to pay an individual debt?" and which required reasons for the answer given, over 90 per cent. of a class within my personal knowledge failed to give a correct answer, and by such failure showed that they knew nothing of the principles involved in the first question suggested. Yet many of the questions asked at these special examinations last

June had no more of substance in them than the first question above mentioned.

Uniformity in examinations is simple justice to law students, and anything approaching uniformity under the present system is not by design but by accident.

A literary qualification is required by the proposed rules. This is offered more for discussion than as expressive of an individual opinion. There is a legal side to the question, however, to which I may refer.

The statute requires the examiners to certify that the applicant has sufficient general learning to discharge the duties of an attorney. I think you will all agree that such certificate ought not to be required nor made, unless it is true; and how the truth of the matter can be determined without any evidence on the subject, must be answered by those who are opposed to a literary qualification and examination.

The registration of law students is, in the judgment of the undersigned, altogether the most important step forward, that can be taken. And yet it is somewhat difficult to work out clear and satisfactory rules under section 560, as to students coming here from another state. The section begins with the declaration that "No person shall be admitted to such examination unless he has resided in the state for the year next preceding." Further along in the section is to be found this language, "but any person residing in the state, or coming into the state for the purpose of making it his permanent residence, upon producing satisfactory evidence that he has studied law for a period of three years and has been regularly admitted as an attorney in a court of record within the United States, or that having been so admitted after a shorter period of study, he has been in the practice of law in such court for a time which, added to such period of study, make up three years, may be admitted to such examination."

While one part of the section positively and unconditionally requires a year's residence as a necessary condition to admission to an examination, another part clearly excludes the necessity of such residence as to certain persons.

Giving the language last quoted the effect of an exception to the language

first quoted, which I think is the proper construction of the statute, we have two classes of students coming from another state with which to deal in formulating rules. Where there has been no admission to the bar of another state, there must be a residence here of one year, and this must be true even though the student may have studied law for three years in another state. Such person comes within the express language of the section positively requiring a year's residence, and he is not within the descriptive terms of any other part of the section which may be construed as an exception. It is this view of the statute that imposes the necessity for the considerable detail exhibit in the proposed rules in reference to registration.

Another question only has been suggested in this connection, and that is, as to the power or authority of the supreme court to require registration of law students. My individual opinion is that the supreme court has such power. The court is expressly authorized by section 558 to "prescribe and publish rules to govern such examination." The statutory language under which the New York rules were formulated, is as follows: "Such court shall prescribe rules providing for a uniform system of examination which shall govern such Board of Law Examiners in the performance of its duties." \* \* \* There is in substance no difference to be noticed in the powers conferred by the language of these respective statutes. Section 560 requires, as a qualification of the applicant, that he shall *furnish a certificate* that he has read law three years. It does not expressly require him to study law three years. Yet would any one claim that the court was bound by the certificate? What the section means is that the applicant must in fact have studied law for three years, and the supreme court having been empowered to determine this question, must be allowed such incidental powers, as will make effective the evident purpose and design of the statute.

Inasmuch as the matter is now before the supreme court with some prospect of action thereon, it certainly would not be wise to go to the legislature with it, unless the court acts adversely, or after

further effort fails to act. If at all within the province of the court it is much more likely to be better and more effectually done by such tribunal than by the legislature.

I should be permitted to say, in justice to myself, that I do not think any set of rules however perfect, will, at once and unaided, work the complete reformation desired. Perfect machinery must be operated by skillful workmen to produce good results. Just and effective rules and a competent standing committee are the necessary complements of one another. The supreme court of Ohio cannot be expected to know every lawyer in the state who would make a safe, honest and intelligent examiner of law students. The court must largely depend upon the recommendations of lawyers in appointing the members of this committee.

Such recommendations should therefore always be guardedly and conscientiously made. That they have not always been so made justifies this mention. Indeed I think it of sufficient importance to say in this connection that if the supreme court should request it, this association could be more safely relied upon to recommend suitable lawyers for members of the examining committee than any other agency. It is pretty certain that if such request were made and acted on, that only members of this association would be appointed. And I am about ready to say that the lawyer who does not think enough of his profession to become a member of the only organization of the state through which lawyers may act unitedly in favor of beneficial laws, and therefore for the benefit of society at large, does not deserve much recognition in the bestowal of the purely honorary positions of the profession.

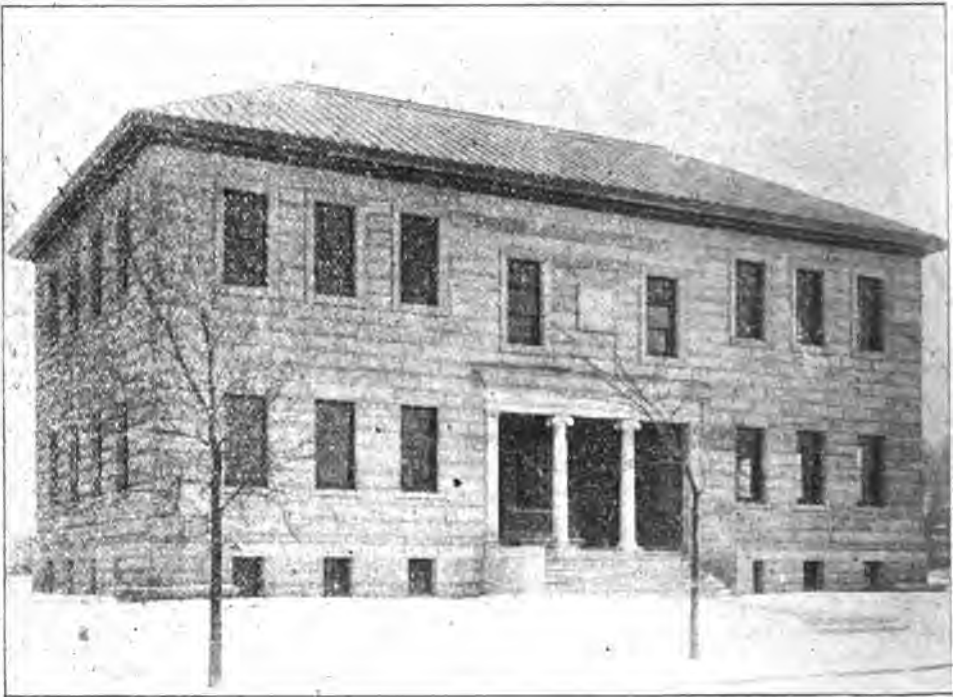
Respectfully submitted,

M. R. PATTERSON.

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The two remaining indictments against Colonel A. B. Coit, of Columbus, for manslaughter, growing out of the famous riot of 1894, at Washington C. H., when several people were killed by the militia, have been nollied by Judge Walters.

In the case of *Smith v. Smith*, (N. J.), 37 Atl. Rep. 49, it was held that it is no bar to the wife's suit for divorce by reason of desertion by the husband for the statutory period, that she in fact, during the period did not desire her husband to return, and felt unwilling to live with him, provided such state of feeling on her part was the result of her husband's misconduct involving cruel treatment of her.

In response to an inquiry from the authorities of the Mansfield reformatory, Attorney-General Monnett has rendered an opinion upon the question of the good time which can be gained by the prisoners in the reformatory. He held that the new law will not permit the application of the rule governing the gaining of good time in the Ohio penitentiary. The method employed at the Mansfield institution requires that the trustees keep a record of the prisoner's conduct by credit marks, and in this way they arrive at the basis of recommendation to the governor that a parole be granted. The prisoners confined in the reformatory are there under indeterminate sentences and the law provides that they shall not be confined longer than the maximum time allowed by the law, nor for a shorter period than the minimum time. As the minimum time of sentence to the penitentiary is one year, the attorney-general holds that no person can be released from the reformatory before the expiration of this period, and the board has no discretion to reduce it by a system of credit marks. Where the minimum time is more than one year, the trustees, by the system of credit marks, may keep the record and certify it to the governor with the recommendation that the prisoner be paroled.

Judge Thomas M. Cooley, the famous constitutional lawyer, and author of "Cooley on the Constitution," everywhere recognized as a standard, is now admittedly not only a physical, but a mental wreck.

For several years the judge has been unable to keep up his work, and it has been noticed for a long time that as the days went by his mind was becoming more and more affected. He has, to use a few words, worked himself to death. His malady is incurable, and only time will release him from the bondage into which he has fallen.

The validity of a contract to give life employment was affirmed in an opinion recently handed down by the supreme court of Michigan, in the case of *Stearns v. L. S. & M. S. Ry. Co.* Suit was brought by plaintiff to recover damages for breach of contract made in 1872. In settlement of a claim made by the plaintiff for damages for serious personal injuries sustained while in its employ, the company paid the plaintiff \$175, and agreed to employ him in the capacity of train baggage master, at a salary of \$47.50 per month, during his natural life, or his ability to do the work. In 1895, defendant discharged plaintiff, and refused to pay or employ him any longer. A verdict was rendered in the circuit court sustaining the plaintiff's claim. The company appealed claiming that the contract was not enforceable, because not mutual; that plaintiff was not bound to work for any stated time for the defendant. In a case where no consideration passed for the employment, says the court, "there might be force in this contention; but in this case, under the proofs, a valuable consideration was paid to the defendant for the conditional agreement which the defendant saw fit to enter into, leaving it optional with the plaintiff to continue in defendant's employ, the engagement of the defendant resting not upon the consideration of any promise by the plaintiff, but upon a consideration actually paid in hand, at the time of the engagement—namely the compromise of the disputed claim."

In the case of *Eislein v. Palmer*, decided by the Hamilton circuit court, the plaintiff sued for damages on account of the leaving of a piece of broken needle in her body by the defendant during a surgical operation. The trial judge directed a verdict for the defendant, but a demand was made that the jury be polled, and one of them when thus inquired of stated that the verdict which had just been returned was *not* his verdict.

In an opinion filed by Judge Swing, of the circuit court, it was held that the verdict of the jury, which is to become the foundation of the judgment; must be the verdict of all the jury; and as the verdict in this case, notwithstanding the direction of the court, was not the verdict of all the jury, it was not a valid verdict. And further, that there was evidence respecting the alleged negligence of the defendant, in not informing the plaintiff of the broken needle having been left in the incision, which should have gone to the jury.

#### CONSTRUCTION—SOME OF ITS USES AND ABUSES.

[Address of Hon. F. E. Hutchinson, of Warren, Ohio, before the Ohio State Bar Association. Put-in-Bay, July 22, 1897.]

*Mr. President and Gentlemen of the Ohio State Bar Association:*

What I shall have to say upon this subject, will be, in the main, equally applicable to statutes, contracts, and other written instruments; and I shall make no distinction between construction, and interpretation, if, indeed, with deference to theoretical idea spinners, there be any really useful distinction between the two words.

As construction is much the work of the courts, to discuss it is to discuss some of their methods; and if, in doing so, I make some criticisms of those methods, I am sure those who know me will, and I trust the others also, will acquit me of intentional disrespect. And if I attack some rules and principles that have come down to us sanctified by time, and hoary with antiquity, it is because either there never was any good reason for this existence, or that such reason no longer exists.

I am not what may be called a strict or literal constructionist, unless, to hold that an instrument should be taken to mean just what it plainly says, is to be such. But, I do think that the sole office of construction is to extract the true meaning from what is ambiguously expressed, and that there its office ends; and that, except in cases of technical words, or when words may have different meanings, when applied to different subjects, construction has nothing whatever to do with that which, according to the ordinary meaning of the language used, expresses a clear and certain meaning; and that this is not changed because such plain meaning, in a given case, makes the instrument unwise, absurd, or unconstitutional. And this is the plain result of one of the most elementary of the rules of construction, which may be tersely expressed by saying: "There must be no construction where there can be no ambiguity." Indeed, the very definition of the word indicates that there is something of doubtful or ambiguous meaning which requires construction.

It is the sole province of courts and lawyers, not to make sensible, wise, or constitutional laws, nor to amend so as to make them such,—but simply to declare those that are plain, and construe those that are ambiguous. Our governmental departments are three-fold and independent,—one to enact laws, one to expound, and one to execute them, and the judiciary has no more rightful power to amend a statute, by making it, by construction, mean something different from what it plainly says than the legislature has to revise the judgments of the courts; and this is equally true, no matter that the statute, plain in its meaning, is absurd, unwise, or unconstitutional. True, if there is an ambiguity, if the instrument is fairly susceptible of two meanings, one of which will make it unwise, absurd, or unconstitutional, and the other the reverse, the latter will be chosen. But, I am not now speaking of cases of ambiguity, but of the very bad practice into which courts, including our own, have sometimes fallen, of trying, by construction, to make a statute or contract what they think it ought to be,

when its plain meaning is something different.

It is absurd to say that a particular combination of words means one thing or another, dependent upon the effect of such meaning, or whether it makes the instrument good or bad. In fact, the effect of the meaning has nothing whatever to do with what that meaning is.

To illustrate by a very few of many instances. One section of our Statutes of Frauds provided, as do those of most or all of the states, in substance, that all conveyances made with intent to hinder, delay, or defraud creditors shall be utterly void and of no effect. Nothing could be plainer, less susceptible of construction, or more absolute than this. It contains no exception, no limitation, and admits of none. And yet the courts, by construction, have engrafted upon it most material and important limitation and exceptions, to the extent of making that which was plainly applicable to everybody and to every case, applicable to but very few and to but very few of the cases directly within its terms, and held that such conveyances, instead of being null and void, as the statute said, were just as good as any others, provided no creditor was, in fact, injured.

The courts thought that this statute was intended to protect creditors, and therefore, so long as none of that class were injured, no harm was done by the conveyance. But, what business had a court to think anything about so plain a statute, except to declare that to be void, which the statute said was void?

But, if courts must construe that which is plain, and find a reason for a statute, it would seem that they might have found ample reason for making this statute just what it so plainly was. Our penal laws were intended quite as much to prevent as to punish offences, and what so good a way to prevent this class of frauds upon creditors, as to provide, as this statute did, that the fraudulent grantee should himself take nothing by his fraud? The statute was itself its own sufficient reason; but if courts must have some other one, it would seem not difficult to discover a quite sufficient one for this wholesome statute. But the great error, was in the violation of that first

rule of construction, which says you shall not construe that which is plain. This construction began with the similar English statute, and our courts, like sheep following a leader, have jumped the same high fence of the statute, when right beside them was the broad open gate of correct interpretation, their sole legitimate province, and the only road they were authorized to follow.

When this question first came before our supreme court, in *Burgett v. Burgett*, 1 O., 469, Judge Hitchcock, to his credit, dissented; but the construction thus adopted has ever since been followed, and while the legislature made one statute, the court have made another entirely different.

In sharp contrast with this is the holding of the courts upon gambling contracts. The penal part of our statute upon this subject differs in but one unimportant word from that construed in *Burgett v. Burgett*, *supra*, it being in one case "shall be utterly void and of no effect," and in the other, "absolutely void and of no effect." And yet, while in the former case the courts held such instruments to be not void at all, but voidable, only as to creditors, in the other they held them absolutely void, even in the hands of innocent purchasers. And this sharp inconsistency runs through many other cases, in some of which the courts held that acts expressly made void by statute, are void only as to some particular persons; in others, are only voidable at the option of some persons; and in others, void just as the statute says, and this not at all because of any difference in the language of the different statutes, or its meaning.

This striking inconsistency is attempted to be justified, and it would seem to need some justification, upon the ground that, when the prohibition is in favor of a class who can protect themselves, the word "void" should be construed voidable, at their election, but when it concerns matters of public policy, the full effect should be given to the language used.

But, what business have courts to reason at all about a plain statute, or to attempt to give it another meaning, simply because they think that would

effect be given to the language of any statute? It is very dangerous to give to any one the power to annul statutes, by construction or otherwise, or to say that full effect shall not be given to the language of any statute, and especially to a plain one; and, if courts have any such power, it should be exercised with the most extreme caution, for in that way danger lies. And the public policy has vested the law-making power in the legislature, and not in the courts.

We might stop here to say that the public policy of a state is best indicated by its public laws, and that an act expressly prohibited by a public statute, because of its general evil, is as much against public policy as it can be made or declared by statute or by courts. We might stop, also, to enquire who constituted the courts the judges, as against the legislature, of what is or is not against public policy, in matters upon which the legislature has acted? It is for the legislature alone, when prohibiting certain acts by statute, to say whether the acts prohibited are so far against the public policy of the state as to require them to be made void altogether, or only voidable at the election of the parties injured by them, and, having legislated upon the subject, it is not within the judicial competency to review or revise its decision. But even if it were within the judicial province, it is by no means clear that cheating creditors by fraudulent conveyances, is any less against public policy than is betting upon a horse race.

Doubtless the statute considered in *Burgett v. Burgett*, as to conveyances in fraud of creditors, is much too broad and sweeping in its terms, and is obnoxious to the criticisms of Judge Burket in his opinion in that case, and, doubtless the statute is better as the courts have amended it; but these considerations are addressed to the legislature alone, and are entirely without force when addressed to a court, whose only province is to declare the law as it stands.

This construction was a palpable violation of two of the most elementary and important rules of construction.—First, that you shall not construe that which is plain; and the second is like unto the first, you shall not, by construction,

raise a doubt, in order to construe or resolve it.

We are all familiar with the case of which Blackstone tells us, under a statute enacting a penalty against one who should draw blood in the streets, and where the court gravely held that it did not apply to a surgeon who bled a man who had fallen in the street in a fit. But why did not the statute apply to him, if he came within the terms of its prohibition, as the court seemed to think he did. If the surgeon had done the act prohibited, he was liable to the penalty; and the only legitimate question was, whether he had done so. The court might have reached the same result without violating any of its rules, if it had remembered and acted upon another of those rules which gives to technical words and expressions a technical meaning, and had considered, as the fact was, that this expression "draw blood in the streets" was a technical one, and had relation to shedding blood in street brawls, quarrels, and affrays. Under this rule the surgeon would not have been within the prohibition of the statute, any more than would a butcher drawing a calf to the shambles, or a mother her baby in its carriage, both of whom would be drawing flesh as well as blood in the streets. But, without resorting to this rule of construction, the court thought the statute ought not to apply to the surgeon, and so held that it did not, although they seemed to think he came within its plain provisions.

Our constitution provides that no bill shall contain more than one subject, which shall be plainly expressed in its title. This is plain and leaves no room for construction, for there is nothing to construe; and yet, our supreme court has said in substance that this provision is directory only, and one which the legislature may obey or not as it chooses, which is to say that a statute in violation of that provision may be just as good as any other. Besides the two other rules mentioned, this violates a third rule of construction, which holds all constitutional provisions to be mandatory, unless plainly directory merely. And when we consider the crying evil at which this provision was pointed, and which the people attempted to correct, it can hardly

be said to be plain that, by their very prohibition, they intended to leave the legislature free to disregard the prohibition and to still continue the very practice it was intended to prevent.

The statutes of descent of the different states provide, as does ours, that on the death of the ancestor, intestate, his estate shall descend to his next of kin. Nothing could be plainer, nothing less susceptible of construction. There is no exception, no limitation, and none was intended. And yet the courts of some of the states have engrafted a most important exception or limitation upon a statute which contained none, and held that the estate did not descend as the statute said it should, in case the heir killed the ancestor in order to inherit.

This proceeded upon the same idea as did the other cases, not that the statute was ambiguous, but that, when applied to a particular case, it was not what it ought to be. In justification of this, which admitted of no justification, the courts invoked a maxim, which was never a rule for the construction of statutes, which says that a person shall not take advantage of, or receive benefit from his own wrong, and they reasoned that, as it was wrong to kill the ancestor for his estate, therefore the heir who did it should not inherit, although the statute plainly said he should. This is to make, not to construe law.

Our own supreme court, to its credit, has repudiated this heresy, and the supreme court of Pennsylvania has refused to amend the statute; but, unfortunately, has placed its decision not entirely upon the ground that the statute was plain, and the court had no power to amend it; but upon the constitutional provision that conviction of crime shall not work a forfeiture of estate or corruption of blood. This leaves it open to the inference that, in another case, under just as plain a statute, but where there was no constitutional inhibition, the court might amend the statute, if it was thought to be needed. The case would have been much more satisfactory if the court had said, as it should have done,—"The statute is plain, and we have no right to amend, or misconstrue it."

I have selected these few cases, much at random, and not conspicuous, among

many that might be cited, to serve as illustrations, of what I have said, and desire to say. It is quite obvious that in these cases, the conclusion was reached, not at all because any one thought the statute was ambiguous, or even susceptible of any such meaning; but simply because, when applied to the particular case, the courts thought the statute ought to be what they declared it to be.

In *Burgell v. Burgell*, before cited, Judge Burnet said that "The power of construing a statute is in the judges, who have power over all laws, and expressly over statutes, to mould them according to reason and conscience, to the best and truest use." No more dangerous or unfounded doctrine, when applied, as it was, to a plain statute, could be announced. Courts have no such power, except in cases of ambiguity; and even then, only when the language is fairly susceptible of the meaning declared, and no such power is now claimed, though it is too often exercised.

Indeed, courts are profuse in their disclaimer of power to amend a statute, or to construe a plain one, and none more so than some of those who, in the cases alluded to, did precisely what they disclaimed. It is not so much the theories of the courts that I criticise, as it is their too frequent practice, which is sometimes entirely inconsistent with their professions, a clear usurpation of power, and a violation of judicial duty.

The fact is, and it should never be forgotten, overlooked, or evaded, that, in this respect, the sole and only duty of a court is to declare the meaning of a statute as it is written. If it is plain, its plain meaning should be taken. If ambiguous or susceptible of more than one meaning, it should be construed in the light of all legitimate consideration; but even then, only to extract a meaning of which the language, when applied to that subject, is fairly susceptible.

Nor, as I have said, is this duty of declaring what is plain, and fairly construing what is ambiguous, any the less imperative because, in a given case, the meaning, thus arrived at, makes the instrument unwise, absurd, or unconstitutional. The same combination of words with a plain meaning, and but one, can mean something different, because

this meaning militates against the wisdom, or the validity of the instrument.

I do not ignore the fact that technical expressions may have a technical meaning different from the ordinary meaning; that the same words may mean one thing, when applied to one subject, and another, when, applied to another subject; nor kindred cases, where plain ordinary words have, when applied to a particular subject matter, a meaning different from that in ordinary use: I am not speaking of these; but of the too prevalent practice of attempting to make a statute or contract conform to the court's notion of what it ought to be.

Courts are not responsible for the statutes of the state, nor for the contracts of individuals. Their whole province, in this regard, is to declare them, when plain, and to fairly construe them, when doubtful or ambiguous.

I say fairly construe what is ambiguous, and here is a field into which I but barely enter in order to make a suggestion claiming nothing more from my entry than mere *pede possessio*, hoping some one with a better title will enter and cultivate.

The suggestion I desire to make, is this, whatever ambiguity or doubt may exist, it must be resolved, if at all:—*First*, by using and giving effect to all the language employed, which is not plainly unmeaning, and *Second*, by giving to that language a meaning of which it is fairly susceptible, when applied to that subject matter.

This undoubted right to construe, in cases of ambiguity, is a dangerous one at best, unless used with great care. Dangerous because the conclusion reached is too apt to reflect the individual notions of the Judge, as to what the instrument ought to be, rather than his real judgment of what it really does mean; and dangerous because of the great uncertainty that must prevail as to how a particular Judge will construe a particular instrument; and these dangers are greatly increased the less we have, or the less we observe established rules for such construction, chief among which are those to which I have alluded, that effect must be given to all the language used, that is not plainly unmeaning, and that the meaning declared shall be one of which the language is fairly susceptible.

The observance of these rules is one of the uses of construction. One of its abuses is this. When a court or Judge finds an instrument, statute, or contract of doubtful meaning, and enters upon the broad and somewhat dangerous domain of construction, his notion of what it ought to be in the particular case, too often gets the better of his judgment of what it is, and the wish becoming father to the thought, he construes the instrument accordingly, without any very careful regard for the language used, or to whether it is fairly susceptible of that meaning, much less whether that is the meaning of which the language is most fairly susceptible; not that he intends to violate these rules of construction, but does so unconsciously and from a failure to keep them always in mind.

This desire to have statutes and contracts what it is thought they ought to be is the prolific parent of many misinterpretations. But courts should remember that they are not responsible for the statutes of the state nor for the contracts of the people: and that with the one they have nothing, and with the other they have little to do with whether they are wise or foolish, constitutional or not, fair or inequitable; and that, with either, their sole province is to declare that which is plain, and fairly expound what is doubtful, leaving the consequences to those who made the instruments.

It should be remembered that certainty of construction is almost as important as correct construction; and that we ought to be as able to know what a particular construction will be, as we are to know what it ought to be.

In case of any fairly plain statute, most any lawyer of experience can tell, with reasonable certainty what is its true meaning; but with this prevalent and growing practice of construing what is plain, he is a bold man who will undertake to tell what a court will say it means, if there is ground for supposing that, when applied to the case in hand, the statute is not what it ought to be.

It is difficult, indeed impossible to so frame general laws that they will not work hardship or injustice in some particular case. And if, when the statute first comes under judicial cognizance, it

is in such a case, then, under this practice of construing what is plain, the whole fabric is in danger of being swept away, because when applied (it is not what it is conceived it ought to be. Or if, in another case,) to that particular case, there exist facts and circumstances which seem to make the application of the statute to them unwise, harsh, or unjust, courts are too apt to reason that the legislature could not have contemplated this situation, and so hold that the statute does not apply in such case, although it is within its clear explicit terms and meaning. This speaks well for the heart of the court, but hardly so for its head. While the "light that leads astray" may be "light from heaven" it none the less leads astray from right construction.

I am not saying that, when the application of a statute to a particular case is manifestly harsh or unjust, a court may or may not usurp the power, and say that the statute ought not to apply to such a case, and therefore does not. It is not an easy question, even in ethics. But such power should be exercised, if at all, only in exceptional cases, and with extreme care. What I criticise is, that it is too often used as a mere matter of construction, and in cases where there is no hardship or injustice to call for its exercise.

Another fruitful source of misinterpretation is the use which is made of one of our rules of construction which states that the primary object of construction is to arrive, in the case of statutes, at the intention of the legislature; and in the case of contracts, at the intention of the parties.

This rule is not so objectionable in itself, for another or a part of the same rule requires this intention to be found from the language used, either alone or in the light of extraneous circumstances. But it is unnecessary, useless in practice, and from the non-observance of this latter part of the rule, opens a wide door to misconstruction. A better object of search, in a practical way, is the real meaning of the instrument,—that is, the meaning of the language used.

Courts, in thus looking for the intention, naturally desire to find it to have been what they think it ought to have

been; and they reason that the legislature or the parties did not intend this, or did intend that, or did, or did not contemplate so and so, or must have intended, or could not have intended the instrument should apply to this, that, or the other state of facts etc. etc.; and thus looking after this unknown, but assumed intention, they too often overlook the obvious meaning of the language used, and find the intention to have been what they think it ought to have been; when, if their inquiry had been addressed solely to what is the meaning of the language used, the construction would have been different.

No lawyer of experience needs to be told that such instances of misconstruction arising from this search for an occult and always unknown intention, are not uncommon; and, I think that some, at least, will agree with me that a better rule, in practice, would be this: "The primary object of construction is to ascertain the meaning of the language of the instrument to be construed."

This would be done then just as it is now, either by taking the language alone, or when read in the light of all permissible extraneous facts, the only change being to make the true meaning of the language used, the object of search, and not an unknown intention, which cannot, in any event, be different from, or other than the meaning of the language used.

This is the only legitimate province of construction, to arrive at the real meaning of the instrument, that is the meaning of the language used, for its language is all there is to a written instrument.

The intention of the legislature, or of the parties to a contract, is either expressed in the instrument, or it is not. If it is, it is to be found alone in the meaning of the language used to express it, if it is not expressed, it goes for nothing, is useless, and it is quite idle to make it the primary object of search. So that, all that construction can do, is to ascertain the meaning of the language of the instrument, and if this reflects the intention of its framers, well and good; if it does not, it is of no practical importance.

Indeed, this vaunted intention, as dis-

tinguished from the meaning of the language used, is not of the slightest importance, and cuts no figure in the construction of an instrument. This is also shown by the uniform refusal of courts to permit any proof whatever of such intention. But, if this intention were the primary object of search, the inconsistency of refusing proof of it would be apparent.

To illustrate, take the case of a contract for the sale of land, where the premises are clearly and sufficiently described, as Lot A. The seller, having tendered a conveyance sues for the price. The purchaser answers that both the parties intended to sell and buy Lot B. alone, and neither intended Lot A., the description of which was inserted by mistake. The plaintiff admits this by a general demurrer. Here we have the intention of the parties admitted of record; and yet, it is not of the slightest importance in construing their contract. The demurrer must be sustained and the plaintiff have judgment, notwithstanding the admitted intention. True, the purchaser might go into a court of equity and have the contract reformed so as to express the intention; but, until he does so, the meaning of the contract is conclusive of the intention, if, indeed, we have anything to do with the intention; and it is idle to look further for what is already conclusively found, and which when found, has nothing whatever to do with the construction of the instrument.

True, in case of ambiguity, we may put ourselves in the place of the framers of the instrument, and look at it from their point of view. But, even then, only to ascertain the meaning of the language used from that standpoint.

I know it will be said that this intention is an aid in ascertaining the meaning of the language used. If there were any certain way of determining this intention; and if, when found, it at all controlled the meaning of the language used, there might be something in this claim. But, consistently with other rules, it is not of the slightest use in that direction and has no such office. For, this intention, if found at all, must be found in the language used, when read in the light of all permissible extraneous facts, and cannot be inconsistent therewith.

It would, therefore, seem quite as easy to determine the meaning, as it is the intention. Indeed, it is much easier, and can be done with much greater certainty. And it is always the meaning of the instrument, statute, or contract that courts are called upon to determine, and not the intention of the framers.

It follows then that when the meaning is found, it is conclusive of the intention. But it is not true that this intention is conclusive, or always even indicative of the meaning; on the contrary, the intention may have been one thing, and the meaning of the language used to express it something very different. To carry the matter further and look for an intention, which is already conclusively found, is quite useless, but not harmless. It opens a wide door, and one too often used, for misconstruction, by substituting for the real meaning of what the instrument expresses, an unknown, but assumed intention that is not expressed, and exists nowhere but in the opinion of the court that it ought to have been. We would often find much better construction by confining it to the ascertainment of the real meaning of the language of the instrument by all legitimate aids, and taking that to be conclusive of the intention; if, indeed, we must still have anything to do with this unimportant consideration, the intention of the framers.

But, we are told that it is to be presumed that legislatures never intend unwise, absurd, or unconstitutional enactments. Granted; and that, in case of ambiguity, such construction should be adopted, if possible, as will avoid this. But, on the other hand, in the light of what we know of them, it cannot be said that legislatures never do make such enactments. And it is wiser and better to determine the character of the instrument from what it says, than to attempt, by construction, to make it wise or constitutional, because of some presumed, but ineffectual intention to make it so.

Another of our rules of construction tells us that all statutes are to be held as constitutional unless they are certainly and plainly otherwise; and that all doubts, in this respect, are to be resolved in favor of their validity. This seems a singular rule. The constitution is the

organic, fundamental law of the state, from which all statutes derive their sanction, and the legislature its only power to enact them. The legislature is a body of limited powers, conferred by the constitution, and all powers not thereby delegated are expressly reserved to the people. The legislature is but the agent and representative of the people, acting under a written and public power of attorney, known to all, and with no power to enact any law not in conformity with the constitution. Indeed, the chief object of very many of the constitutional provisions is to restrain and limit the power of the legislature in making laws; and no statute can have any validity, except within the provisions of that instrument.

It follows, logically and necessarily from this, that the first essential of every statute is that it affirmatively appear that it is within this constitution, and that the power to enact it has been conferred upon the legislature. Just as, in every other case of agency, and the act of the agent must be shown to be within the scope of his known authority. And it follows also that the reverse of the rule under consideration would be the true one, viz:—that every statute should be held invalid, that does not appear to be fairly within the constitution; and all doubts, in this respect, should be resolved in favor of the constitution and against the statute.

Under our present rules, altogether too much reverence is paid to the acts of the legislature, and too little to the constitution, which alone authorizes them. And the frequency with which courts, even under a rule which resolves all doubts in favor of the statute, are compelled to hold statutes unconstitutional, hardly warrants the presumption of such legislative infallibility as to justify this reverential devotion.

Indeed, I know of no warrant in principle for any presumption, whatever, in this regard. Whether a statute is constitutional or not, is purely and simply a legal question, to be determined by a consideration of the constitution, on the one hand, and the terms, effect, and operation of the statute, on the other; and to resort to presumption is to decide the question by a mere *petitio principii*, in-

stead of by inquiry or judgment. It is to assume the very matter in question.

Another of our rules of construction, upon this subject, tells us that it is presumed the legislature never intends to violate the constitution. This is another breach of the rule which makes the intention the principal object of inquiry, instead of the meaning of the language used to express it, and is quite useless. It is entirely immaterial whether it so intends or not, and the presumption helps to nothing. The question in all such cases is not what the legislature intended to do, but what it did do; and that is determined, not by presumption, but by comparing its act with the organic law; and whether the one violates the other is not determined by presumption, and if it does, it is not helped out by any want of legislative intention.

I am not here speaking of ambiguous statute, where one fair construction would make it constitutional and another the reverse, and resort is had to a similar, but useless, presumption of intention to determine the choice; but of a resort to this presumption to determine the very question in controversy.

Nor is this presumption or intention at all necessary; nor of the slightest use, as an aid to construction. For if an instrument be fairly susceptible of two constructions, one of which will make it constitutional, and the other the reverse, it is simply of course that the former will be taken; and this entirely independently of any such presumption. So that this presumption is entirely useless for any legitimate purpose, and its chief use, in practice, is the illegitimate one of determining the constitutionality of a statute by presumption.

Nor is our present practice, in this respect at all justified by the recognized rule that the acts of public officers and agents are presumed to be valid and legal. This *prima facie* presumption has no application whatever, when the validity and constitutionality of a statute is the sole object of inquiry. This must be determined by a comparison of the statute with the constitution, and not by any presumption.

Nor is there, in principle, any reason why doubts of the constitutionality of a statute should be resolved in its favor.

This is to put the statute above the constitution, as if that was the chief thing to be upheld and protected, when the direct reverse is the truth.

Whenever a written constitution, emanating from the people, is the fundamental law of the state, and that constitution delegates to the legislature its only power, and reserves powers not delegated, to the people, when the legislature, under such a constitution, is a body of but delegated powers, delegated and limited by that constitution, it must be always true that the test of the validity of legislative enactments, is their affirmative correspondence with that constitution; and equally true that all serious doubts, in this regard, should be resolved against the statute.

We do not treat our constitution as we do anything which we regard as of great value. If we have a piece of rare china, and are in doubt whether a particular treatment will break it or not, we resolve that doubt in favor of the dish, and abstain from the treatment. And so it is with everything that we really and truly regard as sacred or valuable; and so it ought to be with our constitution, and if there be grave doubts whether a statute is an infraction of its terms, that is a sufficient reason for holding it invalid.

In theory, at least, our constitution is something sacred, and to be kept inviolate. If this be true also in fact, then there is no more dangerous rule or practice than that which invites its violation, by resolving all doubts against the constitution, and in favor of that which is claimed to be in violation of its provisions.

*Gentlemen:* If the time shall ever come when our constitution,—the bulwark and palladium of the rights and liberties of the people,—shall have become, step by step, a mere collection of glittering generalities; and the rights of the people, unprotected by an observance of constitutional provisions, are at the mercy of each ephemeral legislature, substantially unrestrained by constitutional limitations, the observant historian may then find one of the chief causes of this "Decline and Fall," in a rule of our courts which had so little regard for the constitution as to resolve all doubts in

favor of acts claimed to be in violation of its provisions, instead of resolving them against whatever threatened its integrity.

### SUPREME COURT OF OHIO.

#### Official Record of Proceedings.

#### New Cases.

• New cases filed in the supreme court since July 14, 1897.

5637. Albert S. Lightwater v. The State of Ohio. Error to the circuit court of Tuscarawas county. F. S. Roming, Jno. A. Hastittler, Jno. A. Buchanan, for plaintiff. David Barclay, for defendant.

5638. John S. Crawford, etc., v. Henry C. Jins. Error to the circuit court of Hamilton county. E. B. Molang, for plaintiff.

5639. C. E. Riley v. Curtis E. McBride, administrator. Error to the circuit court of Richland county. Armstrong & Johnson, for plaintiff. Cummings & McBride, and W. S. Kerr, for defendant.


5640. Henry South v. Mary Fair et al. Error to the circuit court of Ashland county. William T. Devor and George A. Nicol for plaintiff. McCray & Henny for defendants.

5641. Edward M. Owens v. Minnie E. Hosmer. Error to the circuit court of Franklin county. Earnhart & Swartz, for plaintiff Voorhees & Voorhees, for defendant.


5642. The Nelson Business College Co. v. John A. Lloyd. Error to the circuit court of Hamilton county. William C. Cockran, for plaintiff. William M. Eames and William E. Bundy, for defendant.

5643. Bradford Glycerine Co. v. The St. Mary's Woolen Mfg. Co. Error to the circuit court of Hancock county. George H. Phelps, for plaintiff. Geoke, Culliton & Smith, for defendant.

5644. A. B. Meader, Trustee, v. Caroline L. Blymyer. Error to the circuit court of Hamilton county. Paxton, Warrington & V. Boutet, for plaintiff. Charles B. Wilby, for defendant.



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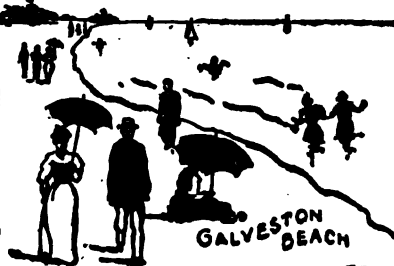
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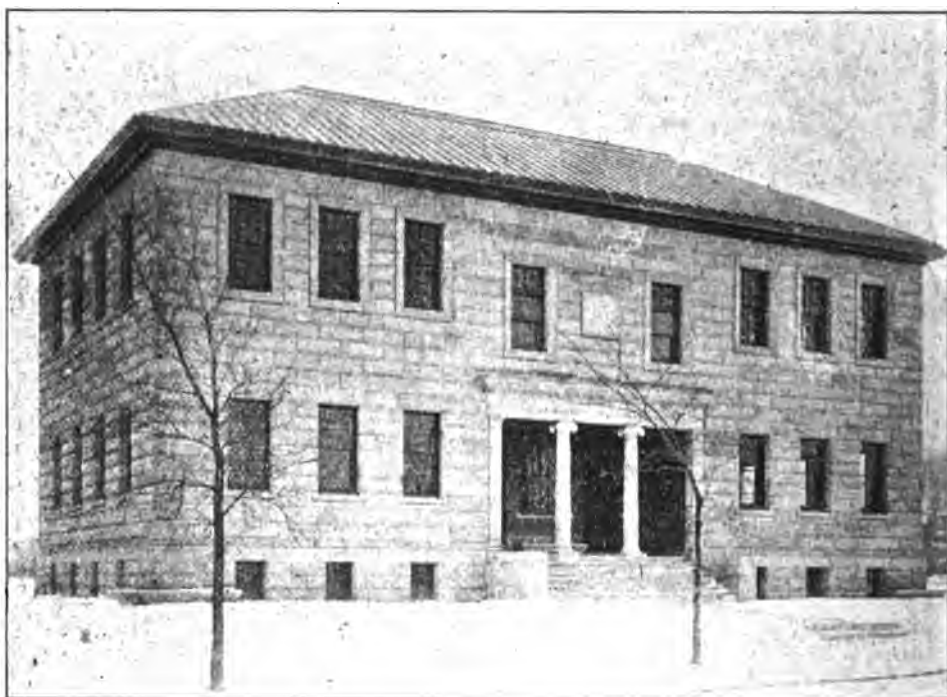


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## Ohio Decisions

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*The growth of this paper during 1896 has been so marked that we confidently assert that it now has a greater circulation than any other Ohio law paper. It also contains so much more legal matter that we are justified in claiming it to be the leading paper in its class.*

In this issue of the News will be found the program of the American Bar Association, which is to be held in Cleveland, August 25, 26 and 27.

The innkeeper is liable for thefts by hotel employees from guests while asleep in rooms assigned them at a hotel, even if such guests are intoxicated. *Cunningham v. Buckley*, (W. Va.), 35 L. R. A. 850.

A statute making it unlawful to manufacture or offer for sale any oleomargarine, artificial or adulterated butter, whether manufactured in or out of the state, unless it is colored, is held to be constitutional. *State v. Myers*, (W. Va.), 35 L. R. A. 850.

A "vote of the people" by which city bonds may be authorized, is held to mean a majority of the voters of the city, and when the vote is taken at the general city election the proposition must receive a majority of all the votes cast at that election. *Bryan v. Stephenson*, (Neb.), 35 L. R. A., 752.

An appropriation of the water of a spring for irrigation by the owner of the land in which the spring is located, is held to be unlawful as against a prior appropriation of water from a stream into which the water of the spring passes by percolation or seepage. *Bruening v. Dorr*, (Colo.), 35 L. R. A. 640.

The time when a municipal debt comes into existence, and not the time when it is due, is held to be the time which must be considered in applying the rule of limitations of indebtedness. If the city has already reached the limit a contract payable in installments must be one which the current revenues will pay as fast as the indebtedness comes into existence, together with other expenses to which the city is liable. *LaPorte v. Gamewell Fire Alarm Teleg. Co.* (Ind.) 35 L. R. A. 686.

The right of an alien corporation to acquire lands "under mortgage" is held to include an acquisition of the land by deed from the mortgagor, where this was done in good faith to satisfy the mortgage debt, and the original purpose was to make a mortgage and not to transfer the title. So held in *Mortgage Co. v. Carstens*, (Wash.), 35 L. R. A., 841.

The grant of an exclusive privilege or use of the streets for railroad purposes is held to be in excess of the powers of a municipal corporation under a statute providing that its consent must be obtained, and that the railway shall be under such regulation, and upon such terms and conditions as the municipality may prescribe. *Detroit Citizens' St. Ry. Co. v. Detroit*, (Mich.), 35 L. R. A. 859.

A libelous publication concerning a family in its collective capacity is held actionable in favor of any member of the family, in the case of *Fenstermaker v. Tribune Pub. Co.*, (Utah) 35 L. R. A. The case further holds that a newspaper article which relates wholly to the private acts of a family with respect to cruel treatment of a child is not privileged.

Judge Tuley, of Chicago, Ill., last Saturday decided that the new city ordinance of Chicago, establishing a vehicle tax is void. The ordinance permitted the city to collect \$1.00 a year license from each bicycle owner and for other vehicles proportionately. The ordinance was passed for the ostensible purpose of raising a permanent street repairing fund. The new law aroused much opposition, especially among the wheelmen. An injunction suit was brought against the city and the enjoining bill was sustained in Judge Tuley's decision. The court held that the city had no right to license bicycles, but only an occupation, and could not impose a license upon specific property when not used in business or in an occupation. Counsel for the city took an appeal to Judge Tuley's decision, and the case will be heard in higher courts, should the opinion of the lower court be sustained, this will establish a valuable precedent to bicycle owners.

Moneys paid into court and deposited in a bank or trust company are held to be exempt from the process of a litigant without first obtaining consent of the court, and cannot be reached without leave of the court by bills filed against the depositors, the clerk, or other persons who have been decreed to have an interest in the funds. *Jones v. Merchants' Nat. Bank*, 35 L. R. A. 698.

The effect of a strike on the liability of of a charterer for delay in unloading is considered in *Empire Transportation Co. v. Railroad Co.*, 35 L. R. A. 623, where it is held that he is not negligent in chartering a vessel after its employes have struck, if there are plenty of other workmen ready to work, if not prevented by intimidation and violence, and that he is not required to pay twenty-five per cent. above the market price to strikers who have abandoned the employment without warning at a critical time, and use intimidation and violence to prevent others from working, or to agree not to prefer faithful and willing laborers.

#### THE JUDICIAL SANCTION OF HOMICIDE.

It is startling and truly deplorable to hear a court of law which should a tribunal of justice, judicially sanction inexcusable homicide, and yet as appear in an article in the first column of the Cincinnati Commercial Tribune for July 17, 1897, this has been done in our sister state of Kentucky, by Judge Gray Falconer, who discharged Jacob S. Harris, who had killed Thomas H. Merrit, for improper intimacy with his, Harris' wife.

Judge Falconer says in effect that it is the unwritten law that a married man with a family of children may lawfully kill any man who is improperly intimate with the wife and mother.

It seems that the judge is making this law to suit the occasion. It is easy to declare that there exists a law which is unwritten, but when, as in the present case, that law is itself of a positive nature and in derogation of our written laws, such a declaration is unwarranted and untenable.

It is the duty of a judge to obey our positive and written law; to punish those who commit offenses against those written laws.

The constitution of the United States which is the highest law we have declares in article 5 of the amendments as follows: "No person shall be deprived of life, liberty or property with due process of law."

Did the dead man, Merrit, have the trial by due process of law therein provided for?

But there are certain exceptions to this provision of the constitution which are recognized and known in the law. For instance any man may take the life of another when that other is about to kill him or do him great bodily harm, or when that other is forcibly entering his home in the night season under circumstances from which an intent to murder or rob him are presumed or an officer of the law may take the life of a felon when necessary to prevent his escape, but in case can one man as a private citizen take the life of another, unless the act is absolutely necessary in the defense of his person, or the persons of others, or of his or their property, or home, from the violent and destroying hand of another, in other words man's life may be taken by man only when the act is absolutely necessary for the defense of his rights or by the authority of the government, and it is the duty of a government to punish all those who undertake to usurp the province of the law and make of themselves judge and executioner in the punishment of crime.

Merrit's life has been taken and his lawful and constitutional rights have been violated. Unless he, who killed him can show that he did so under circumstances which amount to a legal justification, he is guilty of criminal homicide and should be punished according to the laws of the state for the punishment of criminal homicide.

The only way a state has of enforcing the observance of its laws is by prosecuting those who violate those laws.

Harris committed homicide under circumstances which do not amount to a justification in law and should certainly suffer the penalty though the circumstan-

ces of the case should be taken into consideration when sentence is passed.

It would seem that the action of Judge Falconer in dismissing him was erroneous but there is still an opportunity for the hand of justice to act.

Harris has not yet been in jeopardy. He should be rearrested and even if not rearrested he should be indicted and tried, and it is the duty of the prosecuting attorney to see that this is done.

JOHN T. HARBINE, JR.

XENIA, O., July 27, 1897.

#### THE AMERICAN BAR ASSOCIATION.

The twentieth annual meeting of the American Bar Association will be held at Cleveland, Ohio, on Wednesday, Thursday and Friday, August 25, 26 and 27, 1897.

The sessions of the association will be at 10 o'clock A. M. and 8 o'clock, P. M., on Wednesday and Thursday, and at 10 o'clock A. M. on Friday at the Y. M. C. A. Building, located at the corner of Erie and Prospect streets.

The sessions of the Section of Legal Education will be held on Thursday and Friday afternoons at 3 o'clock at the same place. There is a separate program for this section, which will be found below.

The members of the Section of Legal Education will hold a conference with delegates from state and local Bar Associations, in the subject of legal education, and admission to the bar, at the same place, on Tuesday, August 24, at 8 o'clock, P. M.

The sessions of the Section of Patent Law will be held on Thursday and Friday afternoons at 3 o'clock, at the same place. An address will be made by Edmund Wetmore, of New York, chairman of the section, and a paper will be read by Frank F. Reed, of Illinois, on "Trade Censorship by Equity."

#### WEDNESDAY MORNING, TEN O'CLOCK.

The President's Address, by James M. Woolworth of Nebraska.

Nomination and election of members.  
Election of the General Council.

Reports of the secretary and treasurer.  
Report of the executive committee.

#### WEDNESDAY EVENING, EIGHT O'CLOCK.

Reports of standing committees.  
On Jurisprudence and Law Reform.  
On Judicial Administrations and Remedial Procedure.  
On Legal Education and Admission to the Bar.  
On Commercial Law.  
On International Law.  
On Grievances.  
On Law Reporting and Digesting.

#### THURSDAY MORNING, TEN O'CLOCK.

The Annual Address by John W. Griggs, the Governor of New Jersey.  
Reports of special committees:  
On Expression and Classification of the Law.  
On Indian Legislation.  
On Uniform State Laws.  
On Federal Code of Criminal Procedure.  
On Patent Law.  
On Uniformity of Procedure and Comparative Law.

#### THURSDAY EVENING, EIGHT O'CLOCK.

A paper by Robert Mather, of Illinois, on "Constitutional Construction and the Commerce Clause."

A paper by Eugene Wambaugh, of Massachusetts, on "The Present Scope of Government."

Discussion upon the subjects of the papers read.

#### FRIDAY MORNING, TEN O'CLOCK.

Nomination of officers.  
Unfinished business.  
Miscellaneous business.  
Election of officers.

#### SECTION OF LEGAL EDUCATION.

The meetings of the Section of Legal Education will be held at the Y. M. C. A. Building, located at the corner of Erie and Prospect streets, on Tuesday, August 24, at 8 o'clock P. M.; on Thursday, August 26, at 3 o'clock P. M.; and on Friday, August 27, at 3 o'clock P. M.

The following papers will be read:

"Primitive Legal Conceptions in Relation to Modern Law." By Henry E. Davis, Attorney of the United States for the District of Columbia, and lecturer on the History of Law in the Columbian University, Washington, D. C.

"The Law of Insurance in the Law School." By John A. Finch, lecturer on Insurance Law in the Indiana Law School, Indianapolis, Ind.

"The Wage of Law Teachers." By Professor Charles N. Gregory, Associate Dean, of the College of Law of the University of Wisconsin, Madison, Wisconsin.

The meeting on Tuesday evening will be a conference composed of the committee on the Legal Education and Admission to the Bar of the American Bar Association, the Section of Legal Education, and representatives of the state, county and other local Bar Associations of the United States.

The Hollenden Hotel will be the general headquarters of members during the meeting.

The annual dinner will be given at the Hollenden, at 7 o'clock on Friday evening, August 27.

A steamboat excursion on Lake Erie will be given to the Association on Wednesday afternoon by the Cleveland Bar.

A parlor in the Hollenden will be open as a reception room for the use of members of the Association during the meeting.

Members are particularly requested to register their names as soon as convenient after their arrival, in the register of the Association, which will be kept in this room.

The members of the General Council will meet at the reception room at The Hollenden, on Tuesday evening, August 24, at 8 o'clock. The attention of the various standing committees is called to the provision of the By-laws by which such committees are required to meet every year, at such hour as their respective chairmen may appoint, on the day preceding the annual meeting, at the place where the same is to be held. All such committees will also meet at the reception room at the Hollenden, at 8 o'clock on Tuesday evening, August 24, for further consultation.

The officers for 1896-1897 are as follows:

President, James M. Woolworth, Omaha, Nebraska; Secretary, John Hinkley, 215 N. Charles St., Baltimore, Md. Treasurer, Francis Rawle, 328, Chestnut St., Philadelphia, Pa. The Executive Committee is composed of the President, Secretary, Treasurer, Moorfield Storey, of Massachusetts, Alfred Hemenway, of Boston, Mass., Charles Claffin Allen, of St. Louis, Missouri, and William Wirt Howe, of New Orleans, Louisiana.

The Section of Legal Education is in charge of Edward J. Phelps, of Burlington, Vt., Chairman, and George M. Sharpe, of Baltimore, Md., Secretary.

The Section of Patent Law is in charge of Edmund Wetmore, of New York, N. Y., Chairman, and Wilworth H. Thurston, of Providence, R. I., Secretary.

#### QUO WARRANTO PROCEEDINGS IN THE URBANA LYNCHING AFFAIR.

Attorney General Monnett, recently submitted to the governor the following opinion regarding the powers of the governor in the Urbana lynching-affair.

"I have the honor to receive a communication from you, stating that you have been called upon by a delegation of colored citizens asking you, as governor, to instruct the attorney general of the state, to inquire into the official misconduct of the mayor of the city of Urbana, O., and of the sheriff of Champaign county, and to take such necessary steps in the matter as the facts warrant; and you have filed therewith a petition and set of resolutions signed by a large number of citizens.

"You have asked for an official opinion as to what your powers in the premises may be.

"Section 202, Revised Statutes, provides that the attorney general shall appear for the state in the trial and argument of all cases, civil and criminal, in the supreme court wherein the state may be directly interested; and when required by the governor or general assembly, he shall also appear for the state in any court or tribunal in any cause in which

the state is a party, or in which the state is directly interested; and upon the written request of the governor he shall also prosecute any person indicted for any crime.

"Section 204, provides that the attorney general shall prosecute any proceedings in *quo warranto* in the supreme court of the state, the circuit court of Franklin county, or the circuit court of any county where the officer or officers, person or persons, made defendants, reside or may be found.

"Section 6760, provides that a civil action may be brought in *quo warranto* in the supreme court of the state or in the circuit court upon the relation of the attorney general, against a public officer, civil or military, who does or suffers an act, which by the provisions of law, works the forfeiture of his office.

"Section 6762, provides that the attorney general, when directed by the governor, supreme court or general assembly, shall commence any such action, and when, upon complaint or otherwise, he has good reason to believe that any case specified above can be established by proof, he shall commence an action.

"From the foregoing sections it would appear that as to the criminal feature of the action of the mob, mayor or sheriff, the governor may require the attorney general to prosecute any person indicted by the grand jury."

"If proof is furnished your excellency that either of the public officers inquired about in the petition to you have done or suffered an act which, by the provisions of law, worked a forfeiture of their respective offices, your excellency would have the authority to furnish this department with the proof and a written request to me to begin such action in the supreme court of the state in *quo warranto*, asking that the officers be ousted from their respective offices.

"I do not understand that you have any original powers to institute criminal proceedings against any of the alleged violators of law, but this must be begun in the regular manner before the magistrates of the county where the crime is alleged to have been committed.

"Section 6917, provides for the removal of the sheriff in addition to other penalties. It is as follows:

" 'A clerk, sheriff, coroner, constable or other ministerial officer who willfully refuses or neglects to perform any duty he is required by law to perform, in any criminal case or prosecution, and every officer whose duty it is to execute the same, who delays to serve any warrant legally issued in any criminal case, which is delivered to him to execute, when in his power to serve the same, either alone or by calling assistance, shall, if the offense charged by a felony, be fined not more than \$500 or imprisoned not more than 30 days or both; or if the offense be a misdemeanor, be fined not more than \$100 or imprisoned not more than 20 days or both. An officer convicted under this section may be removed from office by order of the court.'

"Throop in his work on public officers states that 'a desertion and neglect of the duties of an office are well recognized at common law as affording sufficient cause for the removal of an officer.'

"If an officer break the conditions attached to his office by law, as for instance, if an officer of the court refuses to attend court, this works forfeiture.

"Throop quotes from the decision of an American judge as follows: 'Public office is held upon the implied condition of diligently and faithfully executing the duties belonging to it, and a willful refusal to perform the duties works a forfeiture.'

"The duty of the sheriff in case of a riot is laid down in section 6894, of the Revised Statutes. It will be observed from the section that the same duty is enjoined upon and the same duty is vested in a justice of the peace as in the sheriff.

"Section 1744, makes the mayor the conservator of the peace throughout the corporation, and gives him the same jurisdiction as the justice. Therefore, although the mayor is not specified in the following section, it applies to him by inference from section 1744:

" 'Whenever three or more persons are unlawfully or riotously assembled it shall be the duty of all judges, justices of the peace, sheriffs and all other ministerial officers, immediately upon view, or as soon as may be on information, to make proclamation in the name of the state of

Ohio, to disperse and depart to their several homes or lawful employments; and if such persons do not then immediately disperse and depart as aforesaid, it shall be the duty of the officers aforesaid, respectively, to call upon all persons near, and, if necessary, throughout the county, to aid and assist in dispersing and taking into custody all persons assembled as aforesaid: and every person called as aforesaid who refuses to render immediate assistance, shall be fined not more than \$50.'

Since the above opinion was rendered, the Attorney General has instituted proceedings in *quo warranto* to oust Mayor Ganson, of Urbana, from office, for alleged misconduct in connection with the lynching of Click Mitchell by a mob. Suit in *quo warranto* has also been commenced against Sheriff McLain of Champaign county.

It will be claimed that neither Mayor Ganson nor Sheriff McLain discharged their duty under section 1744, of the Revised Statutes, and that the mayor at least made no pretenses of doing so, but, on the contrary, threw his influence on the side of the mob. It will be argued from this that he has forfeited his office and can be removed by *quo warranto* proceedings brought under section 6760, Revised Statutes. It is very probable that the case will be given an early hearing when the supreme court convenes in September. The testimony will be taken by deposition, as that is the general custom in *quo warranto* proceedings when brought in the supreme court. The opinion of our supreme court in this case will be received with a great deal of interest, not only in Ohio but throughout the country.

## SUPREME COURT OF OHIO

### Official Record of Proceedings.

#### New Cases.

New cases filed in the supreme court since July 22, 1897.

5645. Clement S. Maxwell, Trustee, v. Levi Revenaugh et al. Error to the circuit court of Muskingum county. J. T. Crew, for plaintiff. Harry C. Sheppard and Durbon & McDermoth, for defendants.

5646. *Wheeler Stevens v. James W. McCoy*, Assignee. Error to the circuit court of Perry county. J. T. Crew for plaintiff. Herbert Butler and L. A. Tussing, for defendant.

5647. *Lena Rudershauser v. Fred Pagels*. Error to the circuit court of Hamilton county. Keam & Keam, for plaintiff. Burch & Johnson and Scott Holmes, for defendant.

5648. *The Wabash R. R. Co. v. Terry E. Heeter*. Error to the circuit court of Lucas county. Alex. L. Smith, for plaintiff. Hurd, Brumback & Thatcher, for defendant.

5649. *L. M. Southern v. James T. Hartness et al.* Error to the circuit court of Cuyahoga county. J. M. Shrouds and John G. White, for plaintiff. Kline, Carr, Tolles & Goff; J. M. Shrouds and John G. White, for defendants.

5650. *Libbie O. L. Southern v. James T. Hartness et al.* Error to the circuit court of Cuyahoga county. J. M. Shrouds and John G. White, for plaintiff. Kline, Carr, Tolles & Goff; J. M. Shrouds and John G. White, for defendants.

5651. *The Commercial Bank of Morris, Sharp & Co. v. George W. Patton, Treas.* Error to the circuit court of Fayette county. John Logan for plaintiff. Harper & Harper, for defendant.

5652. *Gertrude Hesse, Admx. v. The C. S. & H. R. R. Co.* Error to the circuit court of Perry county. Herbert G. Butler and Donahue, Spencer & Donahue, for plaintiff. John Ferguson, for defendant.

5653. *Alvord Admr. v. The Village of Richmond*. Error to the circuit court of Lake county. Horace Alvord and W. A. Foram, for plaintiff.

5654. *H. H. Hoffman v. I. J. Miller et al. Trustees et al.* Error to the circuit court of Hamilton county. William L. Avery, for plaintiff. S. N. Maxwell, for defendant.

5655. *Mt. Adams & Eden Park Inclined Ry. Co. v. Dexter Tufts*. Error to the circuit court of Hamilton county. Kittredge & Wilby, for plaintiff. D. C. Keeler, for defendant.

5656. *Robert L. Adair, Assignee et al. v. Anthony W. Blackburn, Treas. et al.* Error to the circuit court of Wayne county. Adair & Adair, for plaintiff. Johnson & Taylor; E. W. Newkirk and Ross W. French, for defendants.

5657. *William H. Pixley v. James Armstrong et al.* Error to the circuit court of Scioto county. N. W. Evans, for plaintiff. J. P. Purdum; T. C. Anderson and William B. Grice, for defendants.

5658. *Humphrey Jones, Admr. et al. v. Mills Gardner, Admr.* Error to the circuit court of Fayette county. Hidy Sanderson and Humphrey Jones, for plaintiffs. Mills Gardner, for defendants.

5659. *The C. C. & St. L. Ry. Co. v. Nicholas T. Trontwine*. Error to the circuit court of Butler county. Millikin, Shotts & Millikin, for plaintiff. Morey, Andrews & Morey, for defendant.

5660. *Benjamin F. Pope, Admr. v. Mahitable Agner*. Error to the circuit court of Putman county. Leasure & Powell for plaintiff. Watts & Moore, for defendant.

5661. *The State of Ohio ex rel. Attorney General v. Louis H. McLain, Sheriff. Quo warranto.* Attorney General, for plaintiff.

5662. *The State of Ohio ex rel. Attorney General v. Charles H. Ganson, Mayor. Quo warranto.* Attorney General, for plaintiff.

5663. *William E. Snyder v. The First National Bank of Findlay et al.* Error to the circuit court of Hancock county. Pendleton & Whitney for plaintiff. Ed. U. Bope, for defendant.

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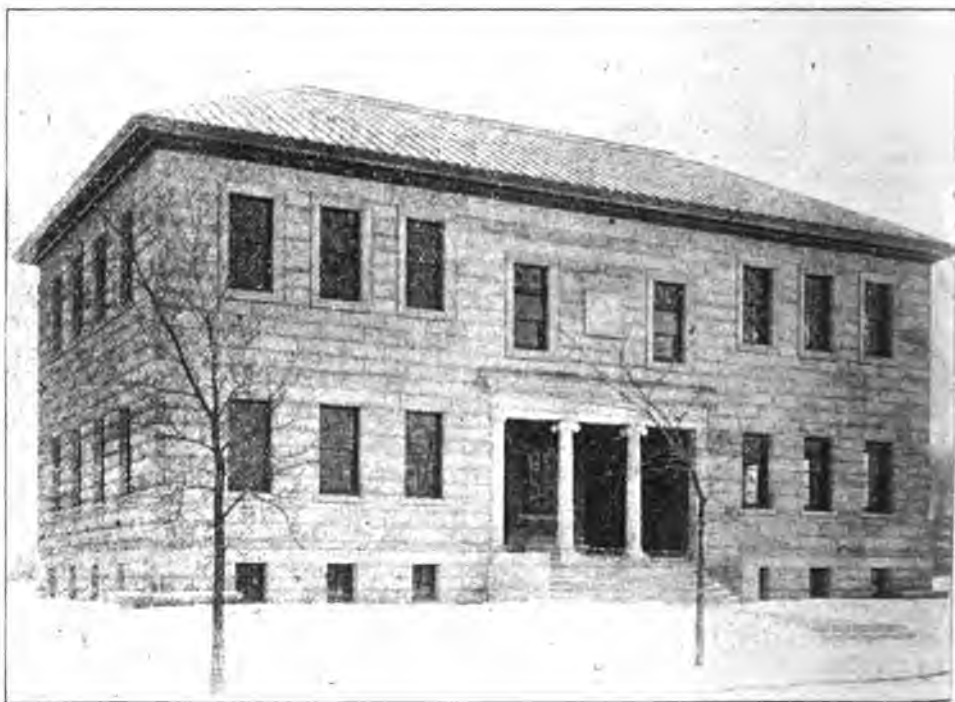
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A Weekly Legal Paper Published by  
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Land purchased for a valuable consideration, and a deed executed, but through mistake of the draughtsman the land was not described. The land was levied on by an execution creditor of the vendor, but with notice of all these facts: *Held*, that by the purchase of the land at the execution sale the equitable right of the original purchaser to have the deed reformed was not defeated. *Milby v. Reagan*. (Tex.), 41 S. W. Rep., 372.

The supreme court of Nebraska has applied the familiar principle of following trust funds to the case of money stolen from a bank by its janitor; rejecting the doctrine which holds that property stolen by a mere servant, not entrusted with any fiduciary duties, cannot be thus recovered, and declaring it, with much reason, to be "indefensible on authority, and opposed to the enlightened policy of modern equity jurisprudence." *Nebraska Natl. Bk. v. Johnson*, 71 N. W. Rep., 294.

According to a recent decision of the court of appeals of Kansas, a person may erect a high board fence upon his own land or on the division line, though by doing so he interferes with the light and air of a building on an adjoining lot, especially when the fence would not have interfered with the light and air, if the building had been placed near the centre of the lot, for the law aims to protect each person in the enjoyment of his own property. *Triplett v. Jackson*, 48 Pac. Rep., 931.

A lease providing that the tenant should have the option of extending the same for another term, "unless the landlord shall pay a fair price for the building," to be erected by the tenant, providing three months' notice be given by either party before the expiration of the lease: *Held*, that suit by the landlord, who had elected to purchase the building and had given the required notice, to enforce such provision, was in effect a suit for specific performance, which equity, after fixing the fair value of the property, would enforce. *Duffy v. Kelly*, (N. J.), 37 Atl., Rep., 597.

An agreement by an attorney-at-law to undertake the conduct of a litigation on his own account, to pay the costs and expenses thereof, and to receive as his compensation a portion of the proceeds of the thing recovered is champertous and void. *Peck v. Henrich*. (U. S. Supreme Ct.) 17 Sup. Ct. Rep., 927.

Where a third person makes advances to a mortgagor, pays taxes on the mortgaged lands, interest on the mortgage, and finally takes an assignment of the mortgage, there having been a mere understanding in an indefinite way that he should get his money when the mortgagor should sell the land, under such circumstances the mortgage cannot be held as security for the advances made before the assignment. *Brooks v. Brooks*, Mass., 47 N. E. Rep., 448.

While a witness may ordinarily testify to a conversation had by him through a telephone with another person, though he is not able to identify the voice of the person responding, yet, when the latter is to be charged with notice of the conversation, (as when it is sought to charge an indorser of a promissory note with liability by a notice of dishonor thus communicated) it must clearly appear that the one who answered was the one who is to be charged; and therefore, when the only evidence of the giving of the notice aforesaid was the testimony of a witness that he called up the office of the indorser, and did not know whether or not it was the indorser or his bookkeeper, or either of them, that answered, it was held that the sustaining of a demurrer to this testimony, on the ground that it furnished no evidence that notice of dishonor was given, was not error. *Thompson et al v. Appleby*, (Kansas), 48 Pac. Rep., 938.

Following the decision in the *Roach habeas corpus* case, reported in full in this issue of the NEWS, Judge Samuel W. Smith addressed Mr. C. S. Sparks, counsel for the prisoner, as follows:;

"I desire to say something to you, Mr. Sparks, in relation to your conduct in this case at the first hearing.

"After the court had been told that the prisoner had not been extradited, and he had been discharged, upon the authority of the McKnight case in the 48 O. S., and upon your representations to the court that it was an extradition proceeding, and that you had notified the prosecuting attorney, the court felt that it had been so treated by you that it was the duty of the court to inflict upon you its most severe punishment. But the return of the prisoner by you for a rehearing, and the statement of Mr. Pugh of his conversation before the trial yesterday, in which he said that it was the duty of the county prosecutor to attend to these cases, and the court having in mind the Ennis case, in which the assistant county prosecutor informed the court that in cases from the police court it was the duty of the city prosecutor, and not the county prosecutor, to attend to them, showing thereby a doubt which might exist as to whose duty it was to watch these cases when they come from the police court, the court feels that these are circumstances which lead the court to refrain from the appointment of a committee to investigate your conduct.

"But I desire to say to you, and to all members of this bar, that statements by attorneys must in every particular be accurate; else the business of the courts can not be transacted. And when attorneys are arguing to the court and making statements upon a subject which makes an impression upon that court, they should not deftly resort to the use of language calculated to sustain an erroneous impression of the court, and, by such subterfuges, afterwards claim that the language was otherwise than as understood by the court."

At the conclusion of the above, Mr. Sparks made an explanation and offered an apology, which the court said would be accepted.

## HOMICIDE.

[Richland Common Pleas Court, July 17, 1897.]

STATE V. PATE.

## CHARGE TO THE JURY.

[Delivered by Judge Wolfe.]

*Gentlemen of the Jury:* The statute of Ohio defines and determines what acts constitute crime and prescribes the punishment therefor. So that, in order to determine whether any crime has been committed by the defendant, we may first profitably look to the statute of the state, which is here copied so far as it applies to this case:

*First:* "Whoever purposely, and of deliberate and premeditated malice, kills another is guilty of murder in the first degree."

*Second:* "Whoever purposely and maliciously, omitting the element of deliberation and premeditation, kills another is guilty of murder in the second degree."

*Third:* "Whoever unlawfully kills another, omitting the elements of premeditation and deliberation, as appears in the first, and also omitting the elements of purpose and malice, as appears in the second, is guilty of manslaughter."

And again, it is provided by the statute that:

*Fourth:* "Whoever unlawfully assaults or threatens another in a menacing manner, or unlawfully strikes or wounds another, is guilty of assault and battery."

The indictment in this case is so framed and worded that all these crimes so enumerated as first, second, third and fourth, are embraced within its terms, and the jury in its deliberations may find from the evidence the defendant guilty of the first, or murder in the first degree; or, failing in that, they may find the defendant guilty of the second, only, or murder in the second degree; or, failing in both these, they may find him guilty of the third only, or manslaughter; or, failing in the three above mentioned, they may find him guilty of assault and battery only; or, failing to find him guilty of any of these, the verdict should be "not guilty."

I am thus far only instructing you as to the statutory distinctions as to the different degrees of murder and assault and battery, as comprehended in the indictment.

Thus, assault and battery is charged in the indictment in the words found therein: "That the defendant did unlawfully assault and threaten said John Sellers in a menacing manner, and that he, the defendant, did unlawfully strike and wound said Sellers." And, if the proof goes no further, the defendant, if guilty at all, would be guilty of assault and battery only. But if the proof shows more than this and establishes in your minds that, as a direct and immediate consequence of such unlawful acts and wound, the said John Sellers died,—not wounded only but died from such wounds then such killing and such death would constitute manslaughter. And, if the evidence establishes still further that said act of unlawful shooting, wounding and killing was done purposely and maliciously, then such evidence would establish the elements of the indictment constituting murder in the second degree. Again, if added to all this you find that such killing, such death, was done with premeditation and deliberation, you have the highest crime known to the law, murder in the first degree.

Coming now to the consideration of murder as charged in the indictment,—it is averred in substance that on or about June 3, 1897, in the county of Richland and state of Ohio, the defendant, Hollis Pate, with a certain revolver, then and there in his right hand held, charged with powder and ball, did unlawfully, purposely, and with premeditated and deliberate malice, shoot and kill said Sellers in manner and form as charged.

The defendant is entitled to the presumption of innocence, which presumption continues with him throughout the entire trial and until the state overcomes it by full proof and of a degree and character that admits of no reasonable doubt to the contrary. That is, that John Sellers is dead, that said death was caused directly by a ball from a loaded revolver in the hands of and fired by Hollis Pate, on or about the time mentioned in the indictment, and in the county of Richland and state of Ohio, as

averred. And such death or such killing must have been unlawful to constitute manslaughter. And, moreover, it must have been unlawfully, purposely and maliciously done to constitute murder in the second degree. And still, again, it must have been unlawful and done with premeditated and deliberate malice to constitute murder in the first degree.

The presumption of innocence must, as I have instructed you, be overcome, and each and every material averment of the indictment must be proven by the state beyond a reasonable doubt. What, then, is a reasonable doubt?

A verdict of guilty can never be returned without convincing evidence. The law is too humane to demand a conviction while a rational doubt remains in the minds of the jury. The jury will be justified and are required to consider a reasonable doubt as existing, if the material facts without which guilt cannot be established, may fairly be reconciled with innocence. In human affairs absolute certainty is not always attainable. From the nature of things, reasonable certainty is all that can be attained on many subjects. When a full and candid consideration of the evidence produces a conviction of guilt and satisfies the mind to a reasonable certainty, a mere captious or ingenious artificial doubt is of no avail. The jury must look to the evidence and, if that satisfies them of the defendant's guilt, they must say so; but if they are not fully satisfied and find only that there are strong probabilities of guilt, the only safe course is to acquit. And it is a further rule of law that each juror must be so satisfied by evidence beyond a reasonable doubt.

Malice and the design to kill are essential ingredients in the crime of murder in either the first or second degree. Neither malice nor an intent to kill necessarily enters into the crime of manslaughter, where the death results from an unlawful act designed to effect another object.

Malice is the dictate of a wicked, depraved and malignant heart. It is not necessary that the malignity should be confined or directed toward the person injured, but it is evidenced by any act

that springs from a wicked and corrupt motive, attended by circumstances indicating a heart regardless of social duty and bent on mischief. Malice may be shown by previous threats, conduct of the party as well as the weapon used and the injury inflicted; and must include and be considered in connection with the surroundings, having reference to both parties to the transaction. In this case, to constitute crime of whatever degree, the evidence must be convincing beyond a reasonable doubt, you cannot convict on a preponderance of the evidence only.

And thus the jury must find the offense was committed as charged in the indictment: that John Sellers is dead and that his death was caused by wounds by the defendant inflicted, unlawfully, before you can find him guilty of murder as charged therein, or that being wounded by the defendant unlawfully, death was caused by some other agency than such wound, before on that account you can find the defendant guilty of assault and battery as charged in the indictment. It must appear from the evidence, and circumstances in evidence, beyond reasonable doubt, and to each of you that the death was directly caused by a bullet fired from a revolver in defendant's hands, and by him directed, not accidentally, but with the design to injure; and further to convict of murder in the first degree you must be satisfied:

*First*—That the defendant perpetrated the act purposely.

*Second*—That he did it with intent to kill.

*Third*—That he did it of deliberate and premeditated malice.

To constitute deliberate and premeditated malice, the intention to do the injury must have been deliberated upon, and the design to do it formed before the act was done, though it is not required that either should have been present for any considerable time before.

This supposes a party by reflection, understood what he was about to do, and intended to do it, to do harm. If these things are all proven and you find the defendant guilty of murder in the first degree, you need not examine further, but if not so proven to your satisfaction you should acquit him of murder

in the first degree and examine further.

And if you find the death and the defendant's connection therewith as aforesaid, then having acquitted him of murder in the first degree, to convict him of murder in the second degree, you must find from the evidence:

*First*—That the defendant perpetrated the act purposely and maliciously.

*Second*—With intent to kill.

*Third*—Without premeditation and deliberation.

If you are not satisfied of the concurrence of these facts, you should acquit him of murder in the second degree and you will be under the necessity of examining further.

And if you find the death and the defendant's connection therewith as aforesaid before you can convict him of manslaughter you must also in addition find from the evidence:

*First*—That the act was done unlawfully.

*Second*—Without malice.

*Third*—With intent to kill, formed in the heat of a sudden quarrel.

*Fourth*—Without intent to kill while the prisoner was engaged in the commission of some unlawful act.

The preponderance of the evidence, alone, will not be sufficient to prove these elements or any averment of the indictment, but each and all must be proved as to each juror beyond a reasonable doubt, and while the burden of proof is always upon the state the jury must examine all the evidence in the case, to determine whether or not a crime has been committed and whether the defendant is guilty as charged in the indictment.

It is provided by statute that: "Whoever, except a female or blind person, not being in the county in which he usually lives or has his home, is found going about begging and asking subsistence by charity, shall be taken and deemed to be a tramp \* \* \* Any tramp who is found carrying a fire arm or other dangerous weapon, or does or threatens to do any injury to the person or property of another shall be imprisoned in the penitentiary, etc., and any person may, upon view of any such offense apprehend any such offender, and take him before a justice of the peace or

other examining officer for examination."

If the jury find from the evidence that the prisoner, at the time in question was an offender within the provisions of this statute any person, officer or otherwise, upon view of the offence, acting in good faith, with such view and actual knowledge gained from his own senses, would have a right and it would be his duty without a warrant to arrest him, and take him before a magistrate for examination; and if that is the only assault Sellers made, then any resistance by the defendant would be unlawful and unjustifiable, and if by such resistance he shot and killed the officer as charged in the indictment he would be guilty of manslaughter, and if the element of purpose to kill and malice entered therein it would be murder in the second degree, and if in addition to both, premeditation and deliberation entered as further elements it would be murder in the first degree as charged in the indictment. It will, however, be remembered that any person so making such arrest should use only such force as is commensurate with his purpose. If he use more, the officer or person becomes a trespasser and the deceased would not be any more excused than if he pursued the prisoner for any unlawful purpose.

What the purpose is, is a question for the jury and if the conduct of Sellers was such in the pursuit as to put the defendant under great fear of death or great bodily harm, reasonably to be by him apprehended, then he would be justified in resisting even to taking the life of Sellers and it would be a complete defense.

A man may, in his defense, employ sufficient force to repel the assailant. The law does not measure nicely the degree of force which may be employed by a person, attacked, and, if he use more force than is necessary, he is not responsible for it, unless it is so disproportionate to his apparent danger as to show wantonness, revenge, or malicious purpose to injure the assailant.

The jury have a right to take into consideration the defendant, his purpose there, the manner by which and the purpose for which the defendant had possession of the weapon, if he had one, and

the purpose for which the officer had the weapon and for what purpose he approached the defendant.

If the defendant was then a trespasser on the ground of the railroad company, or if he was there for no lawful purpose, or was a loiterer, the railroad company by its employees had the right, first ordering him to leave, to employ such force as would reasonably effect his ejection therefrom, and if the employee or Sellers, if he was so employed, used more force than was reasonably necessary, he would become an aggressor and the right of self-defense would be in the defendant as before defined. If the defendant was rightfully upon the telegraph poles or within the switch where the tragedy occurred, no one had the right to drive him away, and the prisoner in such case could resist with such force as would maintain his rights and if necessary to maintain them, he would be justified in killing his adversary, and such exercise of right would be no offense.

The jury will examine all circumstances with a sincere effort to arrive at the truth and if it shall appear to you that the defendant destroyed the life of John Sellers by purposely and deliberately and premeditatedly shooting him as charged in the indictment with intent to kill, and death from said cause ensued, the crime is murder in the first degree. If he intended to kill, although he formed the designs coolly but a moment before the act, the law esteems it a premeditated killing.

If it shall be proven to you that the act charged was purposely and intentionally inflicted, thereby causing the death of Sellers but without meditation or deliberation before the act, then his crime is murder in the second degree.

But if it shall appear from the evidence that the shot, if fired, was while the defendant was under undue excitement or passion, or was by him done while he was committing some unlawful act and without intending to kill, his crime would be manslaughter.

And from the last conditions, if death did not ensue, or resulted from other causes than the wounds or said bullet, then it would be assault and battery only. Otherwise the defendant is not guilty.

It is the peculiar province of a jury to judge as to the facts. It is the duty of the court to advise as to the law and you will receive the same strictly as indicated by this written charge. When the facts are ascertained the law determines the grade and name of the offence and affixes the punishment, with which you have nothing to do. You pronounce upon the single question of guilt or innocence with the grade of the crime as the case may be. Both you and the court are bound by the law and we have no right to substitute our own opinions for what we think it ought to be as against what it is. The safety of the community depends upon this course.

If you find the prisoner guilty, you will state in your verdict whether it is murder in the first or second, or manslaughter, or assault and battery, as the case may be.

If you find him guilty of murder in the first degree, you will add to the form of your verdict the words "guilty of murder in the first degree as charged in the indictment."

If the second degree, the words "guilty of murder in the second degree, only, as charged in the indictment."

If of manslaughter, you will add the words "guilty of manslaughter, only, as charged in the indictment."

If of assault and battery, you will employ the words "guilty of assault and battery, only, as charged in the indictment."

If not guilty, you will employ the words "not guilty."

You will retire to your room for deliberation, sign your verdict by your foreman appointed from your number, and return the same to court.

[The jury, after deliberating six and one-half hours, returned a verdict of guilty of manslaughter.]

#### SUPREME COURT OF OHIO.

##### Official Record of Proceedings.

##### New Cases.

New cases filed in the supreme court since August 11, 1897:

5664. James Brown v. The Adams Brothers Co. Error to the circuit court of Hancock county. Jason, Blackford & Byal for plaintiff; W. H. McElwaine for defendant.

5665. The Postoria Stave & Barrel Co. v. The Western Assurance Co. of Toronto. Error to the circuit court of Seneca county. McCauley & Weller for plaintiff; Doyle & Lewis and J. F. Brown for defendant.

5666. The Postoria Stave & Barrel Co. v. The Trans-Atlantic Fire Ins. Co. Error to the circuit court of Seneca county. McCauley & Weller for plaintiff; Doyle & Lewis and J. F. Brown for defendant.

5667. The Postoria Stave & Barrel Co. v. The Germania Fire Ins. Co. of New York. Error to the circuit court of Seneca county. McCauley & Weller for plaintiff; Doyle & Lewis and J. F. Brown for defendant.

5668. John Lindt v. Mary P. S. Frazer. Error to the circuit court of Cuyahoga county. George A. Groot for plaintiff.

5669. John Lindt v. William P. Caley. Error to the circuit court of Cuyahoga county. Geo. A. Groot for plaintiff.

5670. In the matter of the assignment of William H. Sloan. Error to the circuit court of Hamilton county. A. M. Warner for plaintiff; William R. Collins for defendant.

5671. Lucian Lindsey, Admr., v. The Ohio Pipe Co. Error to the circuit court of Franklin county. E. E. Corwin and M. B. Earnhart, for plaintiff. Harrison, Olds & Henderson, for defendant.

5672. Edward Snyder et al., Exrs., v. Henry D. Snyder. Error to the circuit court of Holmes county. McClun & Smyser and George W. Sharp, for plaintiffs. Reed & Hanna, for defendant.

5673. The Elyria Gas & Water Co., a taxpayer, etc., v. The City of Elyria. Error to the circuit court of Lorain county. E. G. Johnson, for plaintiff. Lee Stroub, for defendant.

5674. The C. H. V. & T. Ry. Co. v. Annie E. Jones, Admx. Error to the circuit court of Franklin county. C. O. Hunter, for plaintiff. M. B. Earnhart, for defendant.

5675. American Express Co. v. Aultman, Miller & Co. Error to the circuit court of Cuyahoga county. Williamson, Cushing & Clarke, for plaintiff. Squire, Sanders and Dempsey, for defendant.

5676. Edward Quigley v. Michael H. Murphy. Error to the circuit court of Lucas county. Hurd, Brumback & Thatcher, for plaintiff. Parks & Van Campen, for defendant.

5677. Allen Capor et al. v. Farmers' Bank of Loudonville, O. Error to the circuit court of Ashland county. McCray & Kenny, for plaintiff.

5678. Sarah J. Ream et al. v. Charles J. Wolls. Error to the circuit court of Franklin county. E. L. DeWitt, for plaintiff. Richards & Sullivan, for defendant.

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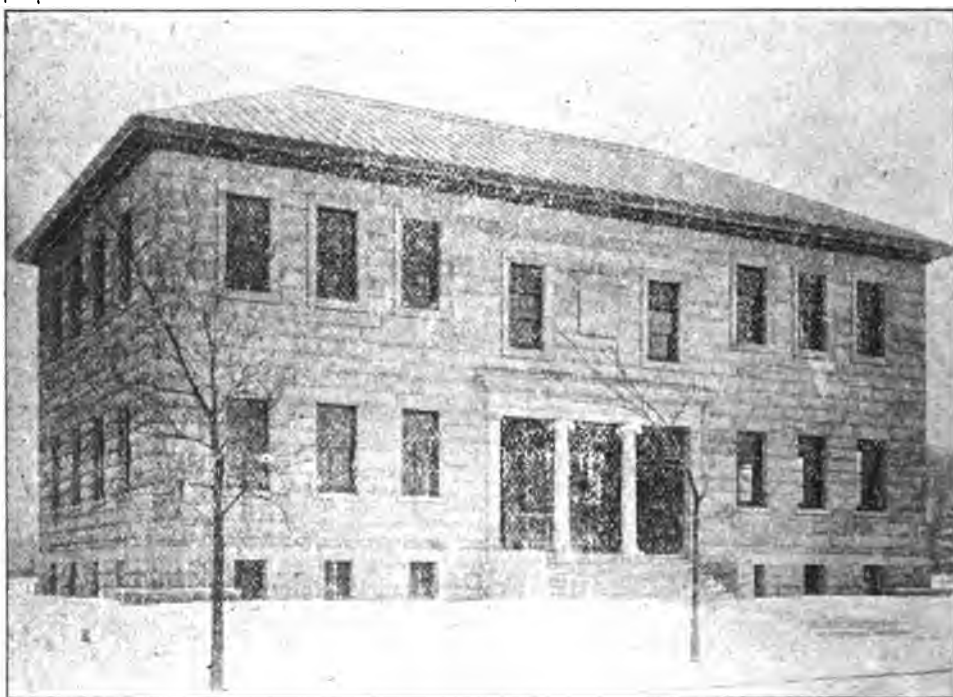
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Associate Justice Stephen J. Field of the supreme court of the United States, on Monday last, broke the record for continuous service on the supreme bench, he having served thirty-four years, five months and six days, or one day longer than Chief Justice John Marshall, whose record of service has hitherto been the longest of the justices since the establishment of that tribunal.

A bicyclist at Philadelphia was killed on a crossing, and his widow sued for damages. But although it was shown that the company was negligent in not giving any warning of an approaching train, and although the bicyclist looked and listened and made a circle with his wheel before crossing the tracks, still the supreme court decided against the widow because the man did not dismount. The case was that of *Robertson v. Pennsylvania Railroad*, 180 Penn. Rep., 48, in which the supreme court held that the bicycle stop (circling around) is not the legal stop, the bicyclist must dismount, look and listen before crossing railroad tracks.

## FUNCTION OF THE UNIVERSITY LAW SCHOOL.

[Annual address of Hon. Lawrence Maxwell, of Cincinnati, before the Ohio State Bar Association, Put-in-Bay, July 21, 1897.]

One of the purposes of the Association, declared in its constitution, is "to encourage thorough, liberal legal education." Other objects are indeed declared, as if they were of prime importance. We propose to advance the science of jurisprudence, to promote reform in the law, to facilitate the administration of justice and to uphold integrity, honor and courtesy in the profession. But if we shall succeed in organizing a thoroughly and liberally educated bar, all the rest follows, and our other reforms are accomplished at one blow. With such a bar the science of jurisprudence advances itself, the administration of justice cannot be otherwise than efficient, and honor, integrity and courtesy in the profession are matters of course. It has seemed to me therefore, that one of the most important, if not the most important, and far-reaching purpose of

the Association is, after all, that which commits it to the encouragement of a high standard of legal education.

When the Association was organized there was indeed great need of its helpful influence in this direction. The road to the bar in this state was then through the district courts. There was no uniform standard, and in most counties, no standard at all. Practically every applicant was admitted. No precaution was taken to exclude any, no matter how inadequately prepared for the responsible duties of a lawyer. We had forfeited our right to be called a learned profession. Much has been accomplished in the meantime, largely through the influence of this Association, but there remains much more to be done. No one can deny the importance of the subject. The bench comes from the bar, and the administration of justice is just what the bench and bar together make it. An educated bar is, therefore, the root of the whole matter.

Up to this time in Ohio, we have secured two things, in the cause of legal education. In the first place, the positive requirement imposed by an act of the legislature that every applicant for admission to the bar shall have studied law regularly and attentively during the period of three years, previous to his application, and on top of that, a provision which directs the supreme court to subject the applicant to the test of an examination, section 558-560, Revised Statutes. In other words, admission to the bar in Ohio is placed where it should be, under the absolute control of the supreme judicial tribunal of the state, subject to the condition, which even that court can not dispense with, that the applicant shall have studied law for three years. The statute contemplates, and the necessities of the case obviously require that the court shall administer its trust through a committee of examiners. The character of that committee is of the highest importance, for the standard, after all, will be practically whatever the administration of the committee makes it.

At the last meeting of the Association a resolution was passed suggesting to the court the expediency of securing greater permanency in the committee of exam-

iners, and of taking precautions against false certificates of study on the part of applicants. It was pointed out, that under a somewhat similar system in New York, candidates were required to file a certificate, not *ex post facto*, as with us, but contemporaneously with the commencement of their period of study of law, that the board of law examiners in that state was composed of three members only, each appointed for three years, with the inducement to service implied in a substantial salary (\$2,000 per annum.) You have heard the report of your committee. It is not my purpose to trespass on the details of the ground. I am content to leave the subject to such regulations as the wisdom and experience of the supreme court, enlightened by the suggestions of the bar, may provide. We are bound to assume that the court will see to it that the statute is faithfully executed, and that all proper and responsible precautions will be taken to prevent admission to the examination of any who have not devoted to the study of law the full period of three years required by the statute.

But while the prescription of a fixed period of study is an important step towards securing proper legal education, it does not insure it. And as much depends upon the place and method of study as on the time. Three years of study under certain conditions, may not signify as much as two years under others. And under any conditions the preliminary training and general education of the student is a factor of the greatest consequence. The only test to which the court or its committee of examiners can subject the applicant is a public examination; but that at the best, is an imperfect test, which may be passed by men who are far from being thoroughly and liberally educated.

Speaking on this point, the Lord Chief Justice of England, in an address delivered at the opening of the course of the Inns of Court, in 1895, complained that it was quite possible for a man of ordinary capacity, without any prolonged study, or real knowledge of the law, to pass their examinations and to gain admission to the English bar, provided he had the guidance of a skillful crammer for a comparatively short time. And

that is a common experience. Ability to pass an examination does not necessarily imply thorough education.

While, therefore, we may congratulate ourselves on a progress which has secured as a condition for admission to the bar, in place of nothing at all, a statutory requirement of three years' professional study, to be followed by a public examination under the supervision of the supreme court, we are still called upon to relax no efforts if we expect to realize our aspirations for a thoroughly and liberally educated bar. We must stand on guard to see that the statute is faithfully and liberally executed, and above all, we must stimulate and cultivate in the profession an ever growing sentiment in favor of real education of the best and highest kind. Without such a sentiment, general and wide spread, statutes and rules will not accomplish their purpose. It is with that view that I propose to avail myself of the time allotted to me to-day to present to the Association some considerations affecting the functions of the University Law School as an instrumentality for legal education in this state.

Our statute provides that an applicant for admission to the bar, must have studied law regularly and attentively during the period of three years. This clearly means, that he must have devoted the period of three years, wholly and exclusively to the study of law. Desultory study, as an incident of some other occupation, is obviously not a compliance with the statute. We are not called upon to consider the wisdom or expediency of requiring a three years' course of study. That question has been settled by the legislature, and we are able to start with the premise involved in their positive mandate, that the full period of three years shall be devoted wholly and exclusively to the study of law, by every one who aspires to assume the responsibilities of the profession in this state. The time of study is definitely fixed; the only conditions left open are the place and method of study. On that subject, the statute gives the option of tuition from a practicing attorney, or regular attendance at a law school. It will be observed that isolated study is not recognized, but "tuition" of some

sort is required; the choice being limited to the tuition of a practicing attorney and that of a law school.

But between these two, what room is there for selection? The tuition of a practicing attorney is a myth. There is no such thing.

And if the requirement of the statute is to be complied with at all, the tuition which it enjoins must be sought in a law school. It can be found nowhere else. The old system of office apprenticeship is not to be invoked. It was an incident of the dark age of the law, of the period of professional lethargy which enforced no standard for admission to the bar, and wholly ignored the position of the law as a learned profession. If the law is really a science, it must be treated as a science and employ the means and methods of instruction recognized as efficient in every other department of learning. The argument to support the systematic training of a law school as the only adequate and proper preparation for the practice of law, is the same argument that recognizes the necessity of schools of medicine, schools of technology, schools of theology, schools generally.

In all the countries of continental Europe, the University law school is the only avenue to the bar. No other preparation is recognized; and this means that every lawyer in these countries must first have the general preparation of a classical education, followed by a course of professional study in the University, which in no country covers a shorter period than three years. In those countries the bar is, indeed, a learned profession and the law a science.

In England, where barristers constitute a separate class from attorneys and solicitors, the requirements for admission to the two branches of the profession, are different. The admission of attorneys and solicitors, is placed by act of parliament, under the control of the society of attorneys and solicitors, now known as the Incorporated Law Society. Its regulations require the candidate, before entering upon the study of law, to submit to a preliminary examination about the equivalent of that for graduation from an American high school. The applicant then enters the office of an at-

torney or solicitor, as an articled clerk, and during four years, attends the school of law, which is carried on by the Incorporated Law Society. In the middle of his course, he must pass an examination in his law studies, known as the intermediate examination, and at the end of the course, he is subjected to a final examination, the result of which determines his right to become an attorney solicitor.

Admission to the higher branch of the profession, is under the control of the Inns of court. They maintain a joint law school, under the direction and management of a council of legal education, composed of twenty benchers,—five from each of the four Inns. Candidates for the bar must pursue their law studies in this school. The prescribed qualification for admission to this school, includes Latin, and is otherwise about the equivalent of an American high school education; but, as a matter of fact, few men enter the profession in England, without a college education. The bar is there regarded by a public sentiment, too strong and general to be ignored, as a learned profession, and not as an avocation to be taken up by any one as a means of livelihood.

It is thus seen, that every civilized country in the world, except our own, requires its lawyers, as a condition of granting them the valuable and profitable franchises and privileges which they enjoy, to prepare themselves for their profession by a systematic course of study in a law school, and as a pre-requisite of commencing their professional study, compels them in most countries, to have the general preliminary education and culture of a college graduate, and in none, allows a less degree of general education than is received in an American high school. Substantially the same condition is imposed by the state of New York, and is practically enforced in some other states. Why should it not be enforced in Ohio?

But before undertaking to answer that question, let me direct your attention a little further to the history and present state of legal education in England and the United States, because as lawyers, we are bound to hear all the evidence before reaching a conclusion.

The long struggle, not yet ended, for the establishment and due enforcement of thorough and systematic methods for the study of law in England, is not easy to understand, unless we recur to the conditions under which it has to be carried on. It was begun nearly a century and a half ago, by Blackstone, then a young man, on fire with a scheme to establish a law faculty at the University of Oxford. He complains, as you remember, in the lecture with which he opened his course, that the young men of England were compelled to resort to the Universities of the Continent, especially those of Switzerland, Germany and Holland, for the education in jurisprudence which was denied them in the Universities of their own country. But Blackstone's scheme to have the English Universities incorporate the study of law into their curriculum, was rejected by the authorities, and after a few years connection with the University, as Vinerian reader, continued in the hope that he might ultimately accomplish his purpose, he resigned. But this first attempt, though unsuccessful in its main purpose, bore rich fruit, for it was the occasion of giving to the world those matchless commentaries that were the first step in the direction of reducing English law from a chaotic state, to something like systematic statement,

I have already had occasion to call the attention of the Association to the futile efforts of John Austin, fifty years later, to establish a chair of jurisprudence at the University of London and at the Middle Temple. That effort, too, though failing in its main purpose, resulted in incalculable benefit to the law, for it furnished us for the first time, with an analysis of legal conceptions resting firmly on a scientific basis.

When Blackstone was exerting himself at Oxford, he was a comparatively young man of thirty or thirty-five, with no standing or experience at the bar, and the same was true of John Austin. Their failure might, therefore, be ascribed in part, to the want of strong and influential professional backing. But it must not be supposed that the effort to establish systematic teaching of the law in England, has not received the support and encouragement of distinguished

members of the profession. Among the most earnest of its advocates will always be remembered the names of Sir Richard Bethell, afterward Lord Westbury, and Sir Roundell Palmer, afterwards Lord Selborne, who lent to the cause the powerful influence of their professional standing and official position, both as law officers of the crown, and later as Lords Chancellor. The movement was carried into parliament. There was a commission of the Commons in 1846, and a royal commission ten years later, both of which pointed out that no legal education, worthy of the name, of a public nature, was then to be had in England. The Inns of court were finally induced to co-operate in the establishment of a law school, through the formation of a council of legal education composed of benchers selected from each of the four Inns.

Since 1872, they have carried on a course of public instruction, but with results so unsatisfactory, as to call forth the address of the Lord Chief Justice, to which I have already referred, delivered at the opening of the course, in October, 1895, in which he pleads for the founding of a genuine law school, whose object shall be not merely to manufacture barristers, but to furnish thorough and systematic training in the history and principles of the law and in the science of jurisprudence.

Within recent years, the Universities of Cambridge and Oxford, have provided courses in law, but rather as an incident of the general education of an undergraduate than as part of a lawyer's professional training. Certain credit is given by the Inns of court, to those who take these courses at the Universities, but they are not thereby excused from pursuing the regular study of the law at the Inns after leaving the University, or from passing the examination of the council of legal education as a condition of a call to the bar. It is not proposed in England to turn over professional training, either in law or medicine, to the ancient Universities, as on the Continent. But the work of the noble band of jurists at Oxford and Cambridge, Holland, Anson, Pollock, Digby and their confreres, has had a powerful influence in stimulating the Inns of court to place their school of law on a higher plane.

The history of legal education in the United States, is a familiar chapter. Our first law school was founded at Litchfield, Connecticut, in 1784, by Judge Reeves, author of the treatise on domestic relations, and afterwards Chief Justice of Connecticut, with whom was subsequently associated Judge Gould. The Harvard law school was begun in 1817, and that of Yale college in 1824. The law school at the University of Virginia was founded in 1825. In 1833, the Cincinnati law school, the first west of the Allegheny mountains, was established by lawyers who had been educated at the Litchfield school. From time to time thereafter, law schools have been formed in all sections of the country. But it is only within the last twenty-five years that they have taken any adequate part in the preparation of young men for the bar. To-day they number between seventy and seventy-five. Ninety per cent. of them are connected with Universities. They employ a teaching force in the neighborhood of seven hundred, and have about ten thousand students enrolled. Ten years ago, the total number of students in the law schools of the United States was less than four thousand. This phenomenal increase, which has been accompanied, also, by the establishment of new schools, is largely due to the movement which has resulted in raising, or rather in establishing a standard for admission to the bar all over the country. The schools have become a necessity. The extent to which they are used is the very best evidence of the profession's estimate of the advantages which they afford.

What are those advantages? First and foremost, the assistance of trained men to guide the novice in his course through a most intricate and difficult science. It is no answer to say, that great lawyers have been formed by a different process. They had to do the best they could with the facilities at their command. We might as well in the age of gas and electric light, insist on sticking to tallow dips, because Coke and Blackstone used them with success. Moreover, the volume of the law and the difficulty of mastering it have increased immensely since their time. It has been justly observed that single judicial opinions can

now be found in which more cases are cited as authority than were referred to by Chief Justice Marshall in the whole course of his long judicial experience, and that briefs are not uncommon in which more cases are noted than Daniel Webster had occasion to examine, from the beginning to the end of his career as an advocate. Surely the student of so vast and complicated a science is entitled to every assistance that modern thought and methods can supply.

A school, with its prescribed courses, regular exercises, stated examinations and the competitive association of young men in classes, with their moot courts and debating clubs, furnishes inducements to study and opportunities for development of which the private student is deprived. They are advantages, which in point of time alone, are likely to make two years under such a system of more value than three under private tuition.

But these are advantages incident to schools generally. My topic is the University law school, and its essential feature is to require a certain amount of general education as a condition of permitting the student to enter on professional study. This brings me back to the practical question which I have proposed. We have seen that in every other country and in some of the states of this country, notably in New York, no one is permitted to begin the study of law without a general education equivalent at least, to that of an American high school. Has the time not arrived when we should take that stand in Ohio? The decision of the question rests with our supreme court. It only requires that they shall exercise their authority to prescribe and enforce a definite standard of general education, such as is imposed for instance by the rules of the Court of Appeals of New York, or by the council of legal education in England. In New York, the rule of the Court of Appeals, requires that applicants who are not graduates of a college or university, shall, before entering upon the study of law, or within one year thereafter, pass an examination in English composition, advanced English, first year Latin, arithmetic, algebra, geometry, United States and English history, civics and economics, or in their substantial equivalents, as defined by the rules

of the university of the state of New York.

A three years' course in law is ample, provided two conditions are observed: The first requires that it shall be taken under proper supervision, and the second, that it shall be preceded by adequate general education. But without both of these conditions, the prescription of time for professional study signifies nothing. But both conditions are either expressly stated or fairly implied in the act of our legislature. In imposing a three years' course of professional study, it cannot be supposed that the legislature intended that it should be undertaken by those who had not properly prepared themselves to make full use of the time, otherwise, three months in one case might count for more than three years in another. It is useless to say, that a young man who has not been trained to study, to the extent at least implied in the course of an American high school, is prepared to enter with advantage on a subject so intricate and complicated, and requiring for its mastery such powers of analysis and generalization, as the law.

No argument of inconvenience or expense to the individual, is admissible. We are not concerned with him but only with the general welfare of the public at large. He has no right to obtrude his plea for a cheap and easy road to the bar. We shall not burden him unnecessarily, but he is asking the state for a valuable franchise and an exclusive privilege. The lawyer seeks among other privileges, the monopoly of holding office in the third department of the government, for none others are eligible. But those monopolies and privileges must be justified, otherwise, they are held without right. How at the end of the nineteenth century, can we, as a profession, claim them without admitting our obligation to come in at least to the minimum standard of professional attainment imposed by every other enlightened nation in the world? It is not setting up an aristocracy of the bar. It is only requiring that those who hold an important public franchise shall maintain their title to it by yielding a consideration which the public has a right to demand.

It will not do to urge the record of the past, for while we have had skillful

lawyers and eminent judges, it is a record which, on the whole, will not bear examination. It is unhappily too full of blundering and waste, and delay and mis-carriage, in the administration of justice, due to an uneducated bar. We are willing to let by-gones be by-gones, and to suffer those who have already entered the profession by the back door to serve their time without reproach; but we are not sufficiently in love with them to wish to augment their number. We insist on keeping pace with the progress of the times. We are not content that the bar at the close of the nineteenth century shall pursue the methods of an ox cart, while commerce, and manufacture, and invention and science, ride past us in the lightning express. We want to count lame and halting procedure, useless litigation, tedious delay and frivolous appeals among the things of the past. In a word, we want an educated and enlightened bar.

But the whole argument for general education as a condition of professional study, was put by Blackstone, and felicitously, one hundred and forty years ago.

"If the student in our laws has formed both his sentiments and style by perusal and imitation of the purest classical writers, among whom historians and orators will best deserve his regard; if he can reason with precision, and separate argument from fallacy, by the clear simple rules of pure unsophisticated logic; if he can fix his attention, and steadily pursue truth through the most intricate deduction, by the use of mathematical demonstrations; if he has enlarged his conceptions of nature and art, by a view of the several branches of genuine experimental philosophy; if he has impressed on his mind the sound maxims of the law of nature, the best and most authentic foundation of human laws; if, lastly, he has contemplated those maxims reduced to a practical system in the laws of imperial Rome; if he has done this, or any part of it, a student thus qualified may enter upon the study of the law with incredible advantage and reputation."

The bar of Ohio has played an honorable part in the history of American jurisprudence. Our predecessors have left us a fair heritage, which it is our duty to preserve. We have declared, as they

would have done in our time, for thorough and liberal legal education, and it is our business to make that declaration good. We have provided means of general education at the public expense. We have placed a university school of law within three hours of every home in the state. In the presence of those facilities, we are entitled to insist that no man in our great commonwealth, shall henceforth come inadequately prepared to the discharge of the high and honorable duties of an attorney and counsellor at law.

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Where plaintiff sued on the first of these notes received by vendor's lien and obtained a decree of foreclosure, before maturity of, and without reference to the other notes, but the decree was not carried out by sale of the property, it was not a bar to a suit to foreclose the lien as to the other notes, and for a rate of the property, and application of the proceeds to the judgment to be recovered and the former judgment. *Holland v. Preston*, (Tex.), 41 S. W. Rep., 374.

A contract for the purchase of shares of the uninsured capital stock of a corporation was claimed to be made with the company by the fraudulent statements of its president, secretary and treasurer, in the conduct of the company's business. On this contract the company issued the stock and received the purchase money. On bill filed by purchaser, against the officers and the company, to abrogate the contract because of the fraud, and for the restoration of the price paid; the company cannot retain the money paid, and defend by denying that it authorized or knew of fraudulent statements. To do full equity, it must also return the money obtained by its fraud. *Garrison v. Electrical Works*, (N. J.), 37 Atl. Rep., 741.

## PROCEEDINGS OF THE AMERICAN BAR ASSOCIATION.

The twentieth annual convention of the American Bar Association was held in Cleveland on Wednesday, Thursday and Friday last week, and throughout the session great interest was manifested.

The first session of the convention was called to order at Association Hall, Wednesday morning, about 150 delegates being present.

President James M. Woolworth of Omaha, Neb., was in the chair, and introduced Judge Samuel F. Hunt, of Cincinnati, the chairman of the committee on entertainment, appointed by the Ohio State Bar Association during its recent session at Put-in-Bay. Judge Hunt greeted the delegates as co-workers in the cause of good government and the maintenance of public order.

President Woolworth responded briefly thanking the Ohio State Bar Association and introduced James H. Hoyt, of the Cleveland Bar, who welcomed the delegates on behalf of the members of the bar of Cleveland. Virgil P. Kline had been expected to deliver the address, but for an unavoidable reason was absent. Mr. Hoyt's impromptu address was highly appreciated, especially that portion of it which referred to the eminent jurists who had made Cleveland their home in the years gone by.

President Woolworth again thanked the members of the Ohio bar in general, and the members of the Cleveland bar in particular for their cordial welcome, and at once began the reading of his annual address, in which he reviewed at length and critically discussed the laws enacted by congress and the various state legislatures during the last year. The address was very highly complimented, and will be published in a subsequent issue of the News. Having concluded his address he resumed his seat, being applauded by the delegates. As soon as the applause subsided Judge Woolworth announced that the next order of business was action upon the report of the general council with reference to application for membership, whereupon Secretary John Hinkler read the names of ninety-four attorneys who sought admission to the association, and by vote they were admitted. Twenty-five of the applicants were from Ohio, and twelve were from Cleveland.

A resolution was introduced by Simeon E. Baldwin, of New Haven, declaring it the sense of the association, that inasmuch as the International Law Association is to hold its convention in this country next year, it be invited to meet at the same time and place as the American Bar Association. The resolution was referred to the executive committee, and the convention adjourned until the evening session.

In the afternoon the delegates enjoyed a ride upon the peaceful waters of Lake Erie. The delegates boarded the City of Buffalo, as the guests of the State Bar Association and the Cuyahoga County Bar Association and for three hours they were carried over the waters of the lake.

The second session of the association was held in Association Hall, Wednesday evening. After the session was called to order, by the president, the annual report of Secretary John Hinkley, of Baltimore, was submitted. The report showed that the association had 1,393 members, and during the year forty-seven applicants had been elected to membership by the executive committee. All the states except Nevada, and all the territories except New Mexico, he reported were represented in the association. The report was received and approved.

The report of the treasurer was to have been submitted, but owing to circumstances he was unable to do so, and was given further time.

Judge William Wirt Howe, of New Orleans, read the report of the committee on jurisprudence and law reform. The report did not make any particular recommendations, but treated at length the decisions rendered by the various state and district courts. The report was received but not discussed.

Judge Sevin J. McCreary, of Keokuk, Iowa, chairman of the committee on judicial administration and remedial procedure, was next introduced by the president. In the course of the report the committee recommended that a committee of three be appointed by the president, charged with the duty of personally presenting to the congress of the United States, and work for the passage of an act to amend the statutes creating the circuit courts of appeal of the United States, and provide for appeal from an interlocutory decree appointing receivers in like manner as that provided for in interlocutory orders of injunction. The resolution was thoroughly discussed and referred back to the committee.

George M. Sharp, of Baltimore, read the report on "Legal Education and Admission to the Bar." The report was very voluminous, and Mr. Sharp simply referred to portions of it. The report was thoroughly discussed, both *pro* and *con*, and its recommendations finally adopted, thus placing the American Bar Association record as favoring higher education for law students.

The chief interest of the evening session centered in the report of the com-

mittee on international law, which was read by Judge M. D. Follett of Marietta.

Thursday, the second day of the convention, the members of the association listened to an excellent address by Governor John W. Griggs, of New Jersey, on "Legislation and the Needs of Reform in Lawmaking," and adopted a resolution which committed the association to an effort to bring about international arbitration treaties with all enlightened nations of the earth.

During the afternoon there were sessions of the legal education branch of the association and the patent law branch of the society. From 4 to 7 o'clock in the evening the delegates were tendered a reception at the home of Andrew Squire, on Euclid avenue. In the evening there was another session of the bar association during which two interesting papers were read and discussed, after which the general council of the association held a meeting and nominated officers.

Judge Brewster, of Connecticut, presented the report of the committee on uniform state law. The report was approved.

Edmund Witmore, of New York, presented a report of patent law, which was also approved.

Judge Charles F. Libby, of Maine, read the report from the committee on Federal Code of Commercial Procedure, which was adopted after a short discussion in which Judge M. D. Follett, of Marietta, took a principal part.

Treasurer Rawle reported that there was \$3,602.48, in the treasury of the association after which an adjournment was taken until evening.

The legal education and patent law sections of the American Bar Association held meetings at the Y. M. C. A. building Thursday afternoon. During the session of legal education section, Henry E. Doris, of Washington, read an exhaustive paper on "Primitive Legal Conceptions in Relation to Modern Law," which dealt at length with the history of jurisprudence. He was followed by John A. Finch, of Indiana, the author of insurance digests who read a paper on "Law of Insurance and the Law School."

Frank F. Reed, of Chicago, read a paper on "Trade Censorship by Equity," before the members of the patent section. He was followed by J. H. Raymond, of Chicago, who advocated the establishment of a patent bar by act of congress.

Francis Forbes, of New York, late delegate from the United States to the conference held under the convention for the Protection of Industrial Property, concluded at Paris, March 20, 1883, read a paper in which he recited the history of the movement for the protection of industrial property which finally culminated in the convention which numbers among its members, in the United States, Great Britain, France, Belgium, Norway, Sweden, Denmark, Spain, Portugal, Italy, Brazil, Holland, Servia, Switzerland, San Domingo, Tunis, and Austro-Hungary. By industrial property is meant patents, trademarks, and commercial names.

The members of the general council of the association held a meeting Thursday and organized for the ensuing year by the election of George P. Wantz, of Grand Rapids, Mich., as chairman.

The election of officers was held late Thursday night by the general council, and the result was announced Friday morning. William Wirt Howe, of Louisiana, was elected president of the association. John Hinkley, of Baltimore, Md., was re-elected secretary, and Francis Rawle, of Pennsylvania, was also re-elected treasurer.

A resolution which caused a furor was introduced by Mr. Adolph Moses, of Illinois. It concerns bribery among public officials and others.

At a meeting of the patent section held at the Hollenden, Friday morning, the president, Edmund Wetmore, of New York, was unanimously re-elected and W. H. Thurston, of Providence, R.I., was re-elected secretary.

A paper by Arthur Stewart, of Baltimore, on a proposed federal trade-mark law, was read by the president, in the absence of Mr. Stewart.

Judge Simeon Baldwin, of New Haven, Conn., was elected president of section on legal education, and George M. Sharp, of Johns Hopkins Law School, Baltimore, was elected secretary.

At the session of the section on legal education held in Association Hall, Friday afternoon, Charles Noble Gregory, professor of law and associate dean in the college of law in the university of Wisconsin, read a paper on the subject "The Wage of Law Teachers."

The closing event in connection with the assemblage of members of the American Bar Association in Cleveland, was the banquet given in the Hollenden, Friday night. The banquet was a magnificent one and was thoroughly enjoyed. American flags and huge palms formed the decorations, which though not lavish in any degree, were tasteful and sufficient. The banqueters were entertained with a series of excellent toasts. W. W. Howe, of New Orleans, the associations' new president, acted as toastmaster.

By action of the executive committee, Hon. William McKinley, president of the United States, was elected to honorary membership in the association.

The following resolution was introduced by Mr. H. F. Stevens, of Minnesota, at the close of the association, Friday:

"Resolved,—That the thanks of the association are hereby tendered to the bar associations of Cleveland and of the state of Ohio for their cordial welcome to this city and state; to the members of the Cleveland bar for their assiduous attention to our comfort and entertainment; to the press for their extended and discriminating reports of our proceedings, and to the citizens of Cleveland for their warm and gracious hospitality; all of which have combined to make our session in this delightful city memorable in the annals of the association."

We shall endeavor to publish, from time to time, the papers and addresses that were read and delivered at the association.

#### OHIO INSURANCE COMPANIES.

The position of the Ohio insurance department on the subject of the powers and limitations of assessment associations in this state is elaborately set forth in a letter sent by Superintendent of Insurance Matthews, last week to the Cen-

tury Life Association of Columbus. The statement was carefully drawn under the advice of counsel and will be made the basis of the mandamus proceeding brought by the association to compel the superintendent of insurance to issue a license.

The questions raised are very important and as the suit will be a test case, it will be watched with the keenest interest by insurance companies. The former complain that the assessment associations are admitted to do business on more favorable terms on the ground that they are mutual and not for profit, but that as a matter of fact their practical operation is to cover the same field as the old line companies.

It is settled that the mandamus proceeding will be brought, and it will probably be heard at the same time as the case of the Hartford of Connecticut, against the superintendent, which involves the same questions. Next to the legal battle between the Lloyds and the regular insurance companies, no case has ever been presented to the court which involves issues of greater importance or interest to the insurance world.

The letter of Superintendent Matthews is as follows:

COLUMBUS, O., Aug. 23, 1897.

*Century Life Association, Columbus, O.:*

GENTLEMEN: The application of your association for a certificate of authority to do a life insurance business in the state of Ohio under the provisions of section 3630 *et seq.* of the Ohio Statutes, and the written argument submitted in behalf of the application by your attorney, have received such careful and intelligent consideration as the judgment and experience of this department affords. Your application and accompanying exhibits show that your company proposes, or would have the power if licensed by this department, to do among other things the following:

*First*—To collect an annual premium for each \$1,000 of insurance ranging from \$24.56 at 21 years of age to \$63.59 at 55 years of age.

*Second*—To collect a single net premium in advance for each \$1,000 of insurance, graduated from \$292.72 at 21 years of age to \$581.51 at 55 years of age.

*Third*—Something over one-half of the annual premiums will be, if your plan works as expected, set aside for a reserve and expense fund.

*Fourth*—You propose, or will have power, if licensed, to make definite contracts with those becoming members having one or more of the following features :

1. To guarantee a fixed amount to be paid at death, or at a stated time, for a single net premium in advance.

2. To make a contract by which premiums may be collected for a stated number of years, after which, if the member continues, he is to receive dividends applicable to the reduction of premiums becoming in time a paid up policy, or a dividend paying annuity.

3. And providing for the payment of a definite sum, as stated times, for the surrender of the policy. There are other objectionable features, but for the purposes to be subserved the foregoing are deemed sufficient.

It will thus be observed that in the plan proposed no assessments are collected at all, but on the contrary, stated premiums are collected which are but little less in amount than those collected by old-line companies, and the promises made for these premiums are virtually the same as those made by old-line companies.

The question, therefore, presented for the determination of this department, is, can an insurance company, proposing to do a business having one or more of the above features, lawfully receive a certificate of authority from this department under section 3630? It is my opinion that it cannot.

The laws of Ohio clearly divide the business of life insurance into three classes, namely, such as may be done by stock companies, such as it is allowed to mutual companies to do, and such as may be carried on by assessment companies. Both stock and mutual companies do business for profit. In the former the profits go to the stockholders, and in the latter are distributed to the policy holders. The franchise which the laws of Ohio give to a stock or mutual company is the right "to make insurance upon the lives of individuals and every insurance appertaining thereto and

connected therewith, \* \* \* and grant, purchase and dispose of annuities."—Section 3587. But this extensive and valuable franchise is not given except upon certain conditions. Such company, whether stock or mutual, must deposit with the superintendent \$100,000 in securities for the protection of policy holders. It must maintain the legal reserve required by statute, so that its promises cannot fail of redemption. It must pay taxes under section 2745. Assessment companies are not required to deposit any securities or maintain any legal or other reserve or surplus of any kind, or to pay any taxes, and are exempt from other burdens imposed on stock and mutual companies. The conclusion must necessarily follow, if the insurance laws are to be harmonized, that assessment companies were not intended to do the same business that stock and mutual companies may do.

The right to deal in annuities is expressly given to stock and mutual companies, and they are expressly given the right to do all things appertaining to life insurance. No such expressed rights are given by section 3630, and the general language of that statute will be controlled, if necessary to avoid a conflict, by the explicit language of section 3587, and the expressed purpose of the legislature to protect persons paying large premiums for insurance with "annuity," "paid-up" and "cash surrender" features. Section 3630 provides for insurance "on the assessment plan." Exactly what that is may be difficult to determine, but that it should not be permitted to conflict with the insurance of stock and mutual companies I am satisfied a proper construction of the law will determine. Section 3630 throws some light on the question. I in part provides, "No such corporation, company or association issuing endowments, certificates of policies, or undertaking or promising to pay to members during life any sum of money, or thing of value, or certificate, or policy guaranteeing any fixed amount to be paid at death, except such fixed amount shall be conditioned upon the same being realized from assessments, made on members to meet them, shall be permitted to do business, in this state, until they shall comply with the

laws regulating regular mutual life insurance companies." The word "assessment" used in this statute doesn't mean the same thing as "premium." Each of these words has a well-defined legal meaning. It was decided in the case of the State v. Monitor Fire Association, 42 O. S., 555, that money paid in advance, without reference to the amount necessary to pay losses is in fact a premium paid for carrying the risk and not an assessment. Consequently, the legislature could not have intended in the use of the word "assessment" that a stated amount should be collected in advance far in excess of death losses, and from the surplus a definite sum promised and paid. Nor can this effect claimed for the statute in question be evaded by providing for an assessment if the premium so collected is not sufficient; for if it can, then section 3630c is useless. The purpose of this section was clearly to provide against the danger of a misconstruction of section 3630, so that if assessment companies should undertake to do the business of regular mutual companies, they should be compelled to assume the burdens of such companies, and adopt the means of protecting the policy-holders required of mutual companies. The legislature saw that to permit an assessment company to do business for the profit of its persistent members, which is precisely the scheme presented by this application, would be to open wide the door for the successful evasion of the legislative guarantees with which life insurance has been surrounded. If by getting in under section 3630, a general life insurance business may be done, definite promises made and annuities created, why should any company come in under the old section, put up its \$100,000 of securities, and obligate itself to maintain a legal reserve? A harmonious construction of the laws of Ohio would limit assessment insurance to actual indemnity for death losses, and to the actual redemption of its promises from a fund to be derived from a specific assessment after the obligation matures, and on such as may be members at the time the obligation accrues. I think section 3630c was enacted to make clear the distinction between regular mutual companies and assessment companies. If both are per-

mitted to do a business for profit, then there is no distinction, and section 3630c is useless.

There is another consideration which leads me to the belief that assessment companies cannot be permitted to do business for profit. Under the general classification of corporations by the Ohio laws, into those for profit, and those for other than profit, such organizations as may be legally made under sections 3630 clearly fall within the latter, and the supreme court of Ohio has so held, and that they cannot therefore do a business for profit.

Here is a plan tendered for license by this department in which premiums are to be charged largely in excess of the natural premium, and promises made for these premiums, to distribute the excess and its accumulations, enhanced by premiums paid on forfeited and lapsed policies to the persistent members in the shape of annuities, cash surrender values, the application of the same to reduction of premiums, etc. Such a plan is one for profit, differing only from a stock company as to where the profits go, and differing in no respect from a mutual company in the distribution of profits. The whole scheme may be succinctly stated to be to charge premiums sufficiently less than stock and mutuals companies to attract business and yet large enough to create a surplus having the semblance of a legal reserve, from which annuities, cash surrender values and so forth may be promised with a plausible show of ability to redeem.

It is of the very essence of insurance that the definite sum guaranteed shall have a corresponding legal reserve to sustain it. As a matter of fact there can be no definite sum absolutely promised without assuming a corresponding liability of reserve. The laws of Ohio do not require of an assessment company that it shall maintain a reserve of any kind. Its doing so is merely voluntary and not obligatory.

Doubtless purely assessment companies have a useful sphere. It is not my business to compare the relative merits of the three systems herein mentioned, but I cannot fail to take heed of the actual unfortunate experience of many assessment companies that have

promised their patrons more than they could perform, and more in my judgment, than the law permitted, and the great number of people that have suffered are suffering from their mistaken faith in such promises.

Following my view of the law I have concluded to license no more companies under section 3630 having the features herein pointed out until the question is passed on by the supreme court, and your application is therefore refused.

Respectfully,

W. S. MATTHEWS,

Superintendent of Insurance for the State of Ohio.

#### SUPREME COURT OF OHIO.

Official Record of Proceedings.

##### New Cases.

New cases filed in the supreme court since Aug. 19, 1897.

5679. *The Real Estate and Improvement Co. v. Ferdinand Roessing, Treas.* Error to the circuit court of Henry county. J. H. Collins for plaintiff.

5680. *William B. Keefer et al. Partners v. William G. Myers et al. Assignees.* Error to the circuit court of Stark county. Sterling & Werntz, for plaintiff. Baldwin & Shields, for defendant.

5681. *The City of Newark v. Alonzo A. McDowell.* Error to the circuit court of Licking county. Fulton & Fulton, for plaintiff.

5682. *William H. Settle et al. Treasurer et al. v. H. W. Albers.* Error to the circuit court of Hamilton county. J. T. DeMar and Oliver B. Jones, for plaintiff. Wilson & Henlinger and Healy & Bannou, for defendant.

5683. *Solomon Seimon, Trustee v. William A. McCrea et al.* Error to the circuit court of Stark county. Clark, Ambler & Clark, and Miller & Pomerene for plaintiff. Day, Lynch & Day and McCarty & McDowell, for defendant.

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The docket for the next term of the United States supreme court, which will begin on the 11th of October, is being prepared. It contains to date 446 cases, showing an addition of 63 cases since the adjournment of the court in May.

Of these cases 128 are from the state courts, 110 from the new federal courts of appeal, 49 from the United States circuit courts, 46 from the territorial courts, 32 from the courts of the District of Columbia, 29 from the court of claims; 26 from the private land court, and 17 from the United States district courts.

There were 595 cases on the docket when the court convened in October, 1896. This year the number will be fully 100 less. The constant falling off indicates that the court will soon be quite up to date with its business. The diminution of cases coming to this tribunal has been caused principally by the creation of the United States courts of appeal, causing a falling off of from 1,000 to 1,500 cases per year in the cases brought to this court from the United States circuit courts.

## DESTRUCTION OF UNSANITARY BUILDINGS.

Judge Owen, director of law of Columbus, rendered an important opinion regarding the authority of the department of health to cause the destruction of unsanitary buildings decreed to be public nuisances. The opinion is as follows:

COLUMBUS, O., *August 30, 1897.*

William H. Williams, Director of Public Safety, and Dr. J. B. Schueller Superintendent of Health and Charities, Columbus, O.:

**GENTLEMEN:** You have the power, derived from the authority of the director of public safety, to declare what are and abate public nuisances, with the qualification that you can not, without the adjudication of a court, destroy or remove the property which is or contains the nuisance. With this qualification you can remove, abate, suspend, alter or otherwise improve or purify the same, and certify the cost and expense thereof to the county auditor, to be assessed against the property, and thereby make it a lien upon the same, to be collected as other taxes. Before doing this, however, you are required to notify the owner, agent or other person or persons having control of the same or being responsible for its condition, and order the abatement of the nuisance. Concerning the authority of the health officer of the city, whose legal designation is superintendent of health and charities, this is the legal status of that officer:

Except as otherwise provided in the city charter, the powers and duties formerly vested in the board of health of the city are vested in the director of public safety. It is provided in the same charter that the council shall provide for the appointment of a health officer, prescribe his duties and fix his compensation. These duties have never been prescribed by the council so far as I can discover. I shall recommend (with your approval) the enactment of an ordinance prescribing such powers and duties and providing that they be such as were formerly vested in the board of health and that all the provisions of law pertaining to such board of health shall be executed by the superintendent of health and charities.

Having already obtained your approval, I shall make the recommendation foreshadowed above.

SELWYN N. OWEN,  
Director of Law

## NEGLIGENCE OF PASSENGERS ON STREET-CARS.

In an action for damages received by a crippled passenger who was standing in the aisle of a street-car, which, owing to an open switch which was under water and therefore could not be seen, caused two street-cars to collide, and the passenger was thrown to the floor and injured; the trial court, which the circuit court of Hamilton county holds to be erroneous, directed the jury to return a verdict for the company.

The jury were told in a special charge that in addition to proving negligence on the part of the company, the plaintiff must have satisfied them from the evidence that she used all available means to secure her safety. But the reviewing court says in an extended opinion prepared by Judge Smith, that the law presumes she was free from fault and it could be only by evidence produced by herself that a presumption that she was negligent could be raised.

In another special charge it was stated that if the testimony raised a suspicion or doubt as to whether plaintiff exercised due care in taking her position in the car, the burden was upon her to remove such suspicion. As to this, Judge Smith says a suspicion or doubt should not prevent a recovery unless it is wholly removed. And in another special charge the instruction was given as a matter of law, that if the plaintiff failed to take hold of the straps (provided for standing passengers), either at all or with sufficient firmness, that she could not recover. But the reviewing court declares that all she was bound to do was to use such reasonable care as to guard against an injury to be reasonably apprehended as is taken by people of ordinary prudence. There may have been one strap within reach, or they may have all been occupied, or the plaintiff may have chosen to support herself by taking hold of the frame of a door or window, or by clinging to the person standing next to her. But the special charge erroneously required that she should have seized and firmly held a strap.

None of the special charges were excepted to at the trial and some of them were expressly assented to by counsel for

the plaintiff. The general charge was without error. Then the question arises, did the correctness of the general charge cure the errors in the special charge? And again, does the failure to note exceptions prevent consideration of the special charges on review?

Judge Smith's answer to the first question is that, inasmuch as the jury had no means of determining which of the opposing charges were correct, and that the erroneous charges may have seemed to them entirely reasonable, it cannot be held that the correct charges cured those which were erroneous.

To the second question the answer is that where the overruling of the motion for a new trial is assigned for error, and all the evidence offered on the trial, together with the charge of the court, is properly brought by the bill of exceptions, a reviewing court will, in connection with the evidence, look to the charge of the court, whether excepted to or not; and if there is reason to believe that the verdict was the result of such erroneous instructions, the court will reverse the judgment and award a new trial.

The opinion in this case is an important one and we shall publish it in full in a subsequent issue of the NEWS.

#### SPECIAL ASSESSMENTS.

Director of Law Owen of Columbus, received a communication from the auditor of Franklin county, requesting an opinion upon the right of the county auditor to claim full compensation for placing on the tax list and indexing unpaid special assessments which have been partly or wholly rebated by the city council.

This question is of general importance throughout the state, as it very frequently happens in our larger cities that after special assessments are certified to the county auditor, a controversy immediately arises between the city and the assessed, which usually results in having the amount of the assessment reduced or entirely removed from the tax list. The work of preparing these assessments for collection is, perhaps more arduous and difficult than that of making collections. And when an assessment has been placed in the hands of the county treasurer for

collection, not unfrequently it is reduced or entirely effaced. When it is reduced there must be a re-adjustment made by the county auditor, and this entails more work than the primary adjustment.

The law provides that the county treasurer shall receive a certain percentage of the special assessments for collecting them. This is divided between the county treasurer and the county auditor, because the work of preparing the assessments for collection and of collecting them is performed by both officials. When an assessment is re-adjusted, it is invariably reduced in amount, and the amount of compensation received by the county treasurer and the county auditor, even though an additional amount of work is required and performed, is lessened accordingly. When the assessment is entirely canceled, neither official receives anything.

In the case under consideration the county auditor of Franklin county desired to know, if, after having performed his part of the work in preparing the assessments for collection, he was not entitled to receive compensation for the work, at a ratio based upon the original amount of the assessments, as certified to him.

Judge Owen takes the view that the collection of compensation for this work is contingent entirely upon the collection of the assessments. There is no other source designated by the law from which compensation might be received, and unless the assessment is collected there is nothing from which to claim or to extract compensation.

The communication of county auditor Holliday, was as follows:

COLUMBUS, O., August 28, 1897.

Hon. Selwyn N. Owen, Director of Law:

DEAR SIR: Section 2295 of the Revised Statutes provides that assessments certified to the county auditor shall be placed upon the tax list by the auditor, with a penalty to cover interest and cost of collection.

Please furnish me with your legal opinion as to my fees in cases of assessments being furnished this office, and as to how I shall proceed with my work in placing the said assessments upon the tax list, indexing them and performing my part of the work under the law. After my

work has been done, and the council by ordinance strikes off part or all of an assessment, am I not entitled to the compensation due the auditor for his work upon the total assessment certified to this office, and upon which I have done my work? Your opinion will greatly oblige.

W. H. HALLIDAY, Auditor.

To the above communication, Judge Owen rendered the following opinion:

COLUMBUS, O., August 30, 1897.

Mr. W. H. Halliday, County Auditor:

DEAR SIR: My opinion must be in the negative. The 10 per cent. to be added, and which is the source of your compensation, is to "cover the cost of collection." It foresupposes that the assessment is to be collected. No collection, no 10 per cent; hence no commission to you.

Respectfully,

SELWYN N. OWEN,  
Director of Law.

The only manner in which the county treasurer or the county auditor may secure relief, seems to be through the refusal of the city council to grant rebates.

#### ATTACHMENT—SLOT MACHINE.

[Magistrate Court, Millcreek Township, Hamilton County, August, 1897.]

I. P. WISE V. IKE MARTIN.

An attachment will lie in a suit to recover money lost in a slot machine.

HEARD ON MOTION to dismiss the attachment.

MACKELPESH, Justice of the Peace.

The plaintiff claims the sum of fifteen and seventy-five one hundredth dollars (\$15.75) for money lost and paid to defendant on account of a scheme of chance, commonly known as a slot machine, at Chester Park, July 27, 1897.

An attachment was issued under the provisions of section 6489 Revised Statutes.

It is claimed by the defendant, on a motion to dismiss the attachment, that the transaction upon which the action is

brought is a gambling contract and therefore void, and that an attachment will not lie upon such contract. Citing the case of *Kahn, Jr. v. Walton et al*, 46 O. S., 195.

This was a case where the plaintiff below sought by injunction to restrain the bank, upon which certain checks were drawn in a wheat gambling transaction, from paying the checks, and the court held that both parties were *in pari delicto*, and that the relief sought could not be granted.

In the present case, however, an attachment is brought, not under a contract, but under the provisions of the statute.

Attachment is a provisional remedy whereby the defendant's property is placed in the custody of the law to secure the interests of the creditor, pending the determination of the action.

The grounds upon which an attachment may be had are defined by statute, and an attachment based upon those grounds will lie, independent of the cause of action in aid of which it is issued.

"The nature, validity, existence and justice of the cause of action cannot be inquired into on the motion to discharge the attachment."

*Alexander v. Brown*, 2 Disney, 395; see also opinion of Judge Ricks, U. S. District Judge, to same effect in *Jenks v. Richardson*, 1 O. F. Dec., 188.

The statute provides that an attachment may be had in a civil action for the recovery of money where the defendant has fraudulently or criminally contracted the debt or incurred the obligation for which suit is brought; and the supreme court has held, in *Sturdevant v. Tuttle*, 22 O. S., 111, that where the element of crime is present the term obligation, in the statutory sense employed, is equivalent to liability, and that attachment would lie to recover damages, as in the case then under consideration, for assault and battery.

This leads to the inquiry whether the liability incurred in this case results from crime.

The device used in the transaction which is the cause of this action, is known as a slot machine, and is operated by inserting in a slot at the top a coin,

which finds its way into one of several compartments at the bottom, according as it is deflected to one side or the other by pegs or other obstructions against which it may chance to strike.

In my opinion it is clearly within the definition of a gambling machine, in section 6984, Revised Statutes, the keeping of which for the purpose of gambling is punishable by fine and imprisonment, and is therefore a crime under the laws of this state.

Whether, therefore, the transaction complained of was in the nature of a contract void for illegality, it is not necessary to inquire.

The plaintiff is entitled to his remedy of attachment. He seeks neither damages for, enforcement of, or rescission of any contract, void or otherwise.

For this reason also the provisions of section 4269, Revised Statutes, declaring all gambling contracts void, is inapplicable.

It is claimed by defendant that his relation in the use of the machine is that of a dealer, who is entitled to, and liable for, only the commission he receives from its operation by the public. But the defendant, who, in this case, through his employee is the dealer, is also the owner of the machine, and but one person at a time can play against him by depositing money in the slot. After being placed in the slot it passes from the control of the depositor, and should his coin fail to open one of the compartments, he gets nothing in return.

It is self-evident that the owner of a gambling machine cannot by law be compelled to leave it open for public play, and he has therefore the right to withdraw it at any time. His leaving it out with the coin deposited by the last player still in the compartments is merely an inducement or bait to others, and he cannot thereby constitute the last player an antagonist of the next, and thus conclude his right of recovery to all he has lost, under the plea that he (the owner) stands in the position of a dealer, and that the other two play against each other and not against him.

The motion to dismiss the attachment will be overruled.

*A. L. Meinicke*, for Plaintiff.

*Pogue & Pogue*, for Defendant.

## THE BAR AND THE PUBLIC.

[Address of Albert D. Early of Rockford, upon "The Bar and the Public" before the members of the Illinois State Bar Association.]

"God works wonders now and then,  
Behold two lawyers, honest men,"

One of the conundrums we had pounded to us as children, and how many generations before us heard the same I know not, was, "Why is a lawyer like a restless sleeper?" The alliteration upon the word lawyer, asserting he is an Ananias is equally familiar. A toy for children years ago was a miniature effigy of a town crier with a little placard on his bell inscribed, "Lost, a lawyer's conscience!" It may be of some satisfaction to know that the most pointed witticisms and cutting sarcasms have been uttered by those who were unacquainted with the American lawyer.

It would be folly even for a lawyer to assert there were not questionable practices with some, but in whose interest often were these same questionable practices committed? When disclosures follow, and it is a rule of morals that wrongs cannot be kept concealed, the public too often overlook the instigator of the wrong, the recipient of the unjust gain, the client, but cast the opprobrium upon the lawyer, who is merely the agent.

Mankind in all walks of life will bear watching, be he a laborer on the street or a preacher in the pulpit. The honest man courts it, the dishonest man frets under it, but in no business or profession so much as the law, do the individual members so watch the conduct of their associates and so fearlessly expose dishonorable practices.

Speaking of honesty in the broad sense, it is commonly supposed clergymen rank as the greatest exponents of its benefits in daily practice. It is an error so to believe. He occasionally preaches honesty from the pulpit, and generally to a listless audience, while the lawyer in his office is almost daily called upon to direct others into the paths of honesty. The lawyer's observation has plainly demonstrated that, if a person will not be honest to himself and others because it is right, yet that in honesty is the most permanent profit.

As a contrast to the pleasantries indulged in and about the bar, Talmage said in his sermon last Sunday that lawyers as a class are more unprejudiced than any other individuals, and that if he was on trial for his life, and desired justice, he would rather trust to the verdict of a jury of twelve lawyers than to twelve ministers of the Gospel.

Tell me what class of individuals the public so trust? What class has been so true to its trust? Read the daily newspapers, search the records of the courts, and mark how seldom a lawyer is accused of embezzling funds coming into his custody.

Sooner or later, in one manner or another, the public places the custody of its possessions into the hands of the lawyer and banker. How does it treat the two, and with what result?

The client places money in the custody of his lawyer to be applied as directed, and, as a rule, takes no receipt. He deposits money with his banker, but invariably takes a voucher. There is no supervisory examination of the affairs of a lawyer, but the public causes quarterly examinations to be made of the affairs of its incorporated banks. Within the past two years four thousand lawyers have been practicing in this city, and during the same time fifty-three incorporated banks have been depositories of the public. Of all the millions coming into the custody of these attorneys the amount embezzled, so far as is known, is less than \$10,000.

Eight per cent. of these fifty three banks, having a nominal capital and surplus of three millions and deposits of fourteen millions, are now in the hands of receivers. What the loss to the depositors is, is not known, but it is known that nearly, if not all, the nominal capital and surplus has been lost, and that in some instances the stockholders will be assessed. This does not include the record of private bankers, but in their cases the abuses of trust have been more flagrant, and the percentage of payment to depositors will be much less.

Officers and directors of banks are simply trustees. Trustees for the stockholders, trustees for the depositors. There is no rule in equity more sacred, and from which there is less deviation

than that a trustee shall not use the trust estate for his own personal benefit. So unyielding is the enforcement of this rule that, when a trustee violates it and gains, the gain belongs to the estate; and when he loses, the loss must be borne by himself. There is no balancing of gain and loss.

What caused the wrecks of these banks and bankers was the violation of this rule. The officers and managers used the trust funds in personally borrowing, or in promoting enterprises in which they were interested. The same breach of duty has caused the wrecks of hundreds of others. With hardly an exception, when demands were made upon these banks which they were unable to meet, if the officers and directors who were borrowing therefrom, or the enterprises they were promoting from the funds of the bank could have met their obligations, they would have successfully withstood the drain.

What is the duty of the bar to protect the public from the violation of this rule of equity? It is to see that laws are enacted prohibiting officers and directors of banking associations from borrowing of the funds which it is their duty to guard. If the security offered is suitable for their own institutions, the officer or directors desiring a loan can obtain it from another. To the preservation of the savings of the public no single law could be enacted which experience teaches would be more beneficial.

In civil life the bar has furnished many of the greatest men known to history. It has been a forceful agent in the progress of civilization. Civilization only advances as unjust laws are repealed and just laws enacted. Who first recognizes the necessity of change? The lawyer. How? In the study of some case, or in a wrong otherwise brought to his notice.

No body of individuals becomes a nation without law. It has been truly said that "The security of a nation depends upon the wisdom of its laws and the justice with which they are enforced." It follows that the liberties of the people are more in the keeping of the bar than in that of any class or profession.

In this country the greatest single power in legislation has been the bar. Time was when to be a national or state representative was a recognized honor. Then it was that able members were willing to take off their time and give aid to government. The names of those who won undying fame for themselves in the halls of congress and honor for the country which produced them, need not be mentioned. Their labors are of the history of our land. Seldom now will representative members of the bar accept elective offices, and why? Because the indifference of the public has allowed offices to be filled by those whose prior training, education and environment has not given them sufficient strength to withstand the appeals of corruption. The correction of this evil does not lie alone with the bar; it lies with the bar and the public. Let the bar take the initiative, and the public will follow, and cease indifference.

A temple of justice invisible to the eye has been erected. It belongs to the public. Its keeping is with the bar. Webster said of it: "Whoever labors on this edifice with usefulness and distinction; whoever clears its foundations, strengthseeks, among other privileges, the monopoly of holding office in the third department of the government, for none others are eligible. But such monopolies and privileges must be justified, otherwise they are held without right. How at the end of the nineteenth century, can we, as a profession, claim them without admitting our obligation to come up at least to the minimum standard of professional attainment imposed by every other enlightened nation of the world? It is not setting up an aristocracy of the bar. It is only requiring that those who hold an important public franchise shall maintain their title to it by yielding a consideration which the public has a right to demand.

It will not do to urge the record of the past, for, while we have had skillful lawyers and eminent judges, it is a record which will not bear unqualified praise. It is, unhappily, too full of blundering and waste and delay and miscarriage in the administration of justice, due to an uneducated bar. We are willing to let bygones be bygones, and

to suffer those who have already entered the profession by the back door to serve their time without reproach, but we are not sufficiently in love with them to wish to augment their number. We insist on keeping pace with the progress of the times. We are not content that the bar at the close of the nineteenth century shall travel in an ox cart, while commerce, and manufacture, and invention and science ride past us in the lightning express. We want to count lame and halting procedure, useless litigation, tedious delay and frivolous appeals among the things of the past. In a word, we want an educated and enlightened bar.

But the whole argument for general education as a condition of professional study was put by Blackstone, and felicitously, 140 years ago.

"If the student in our laws hath formed both his sentiments and style by perusal and limitation of the purest classical writers, among whom the historians and orators will best deserve his regard; if he can reason with precision, and separate argument from fallacy, by the clear, simple rules of pure, unsophisticated logic; if he can fix his attention, and steadily pursue truth through any the most intricate deduction, by the use of mathematical demonstrations; if he has enlarged his conceptions of nature and art, by a view of the several branches of genuine experimental philosophy; if he has impressed on his mind the sound maxims of the law of nature, the best and most authentic foundation of human laws; if, lastly, he has contemplated those maxims reduced to a practical system in the laws of imperial Rome; if he has done this, or any part of it, a student thus qualified may enter upon the study of the law with incredible advantage and reputation."

The bar of Ohio has played an honorable part in the history of American jurisprudence. Our predecessors have left us a fair heritage, which it is our duty to preserve. We have declared, as they would have done in our time, for thorough and liberal legal education. We must make that declaration good. We have provided ample means of general education at the public expense, and we have established a university law school (one at Cleveland, one at Colum-

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A lawyer at Stratford, Ont., whose sign read, "A Swindle," was advised by a friend to have his first name spelled out in full—Arthur, or Andrew, or whatever it might be. He didn't follow the advice, however. His first name is Adam.

In case where a servant is wrongfully discharged, the general rule is that he is entitled to recover his wages for the balance of his term of employment, less what he has made or might have made in some other position during that period and that he is required to use reasonable diligence in seeking some other position. The question whether he is entitled to recover the expenses of his search for other employment came up for the first time in the case of *Tickle v. Andrae Manufacturing Company*, 70 N. W. Rep., 292, (Wis.) The lower court held that, as the master might show, in mitigation of damages, that the servant had secured other employment, the servant should be credited with reasonable expenses incurred in seeking new employment. The supreme court took the opposite view, holding that the manner of obtaining employment, and the place where it best may be obtained are questions to be decided by the servant himself, and that any traveling or other expenses he may consider necessary for the purpose are matters entirely within the exercise of his own discretion and of no concern to the former employer. It may seem a little strange that the rule is that the discharged servant must use due diligence in seeking other employment in order to reduce the masters' damages, and cannot recover reasonable expenses incurred in the use of such diligence. Yet such is the holding of the supreme court of Wisconsin.

## PERSONAL INJURIES—MALPRACTICE.

[Knox Common Pleas Court, May 28, 1897.]

GEORGE K. TISH v. ANDREW D. WELKER ET AL.

## CHARGE TO THE JURY.

*Gentlemen of the Jury:* The plaintiff in this case, George K. Tish, files his petition against the defendants, An-

drew D. Welker, Frank C. Larimore, and Daniel S. Coleman, and says that on or about the 12th day of August, 1893, the plaintiff broke and fractured the femur bone of his right leg; that on said date, the defendants, holding themselves out as surgeons, were employed by the plaintiff, as surgeons, to set said bone in its proper place, reduce said fracture and to attend plaintiff until he should become cured; that the defendants thereupon entered upon said employment, but were so negligent and unskillful in attempting to reduce said fracture, and in attending and dressing said leg that said bone was not set in its proper place, nor said fracture properly reduced; and that by reason thereof, plaintiff has become seriously and permanently maimed and crippled, and has suffered, and will continue to suffer great pain as long as he lives; that he has been unable and will always be unable to travel or walk about without great difficulty and suffering; that his capacity for labor and following his occupation in life, has been, and will continue to be, seriously and greatly impaired.

That by reason of the premises he has been damaged in the sum of five thousand dollars, for which he asks you to return a verdict in his favor.

To this petition the defendants have filed each his separate answer.

The defendant, Andrew D. Welker, says that he admits that on the 12th day of August, 1893, the bone of the plaintiff's right leg was broken, as alleged in his petition; and for his defense, he denies that he held himself out as a surgeon; denies that he was ever employed by the plaintiff to reduce said fracture or set said broken bone. He says that at the time the plaintiff was injured, he was a practicing physician and lived in the village of Gambier; that on said day he was called to see plaintiff soon after the plaintiff was injured, and after he had made an examination of plaintiff's injured leg he then and there notified the plaintiff, that this defendant's limited skill and experience in surgery, and in the treatment of such serious injuries as that which the plaintiff had sustained, he would not undertake to reduce said

fracture or set said broken bone, or treat the same, and that the plaintiff should employ an experienced and skillful surgeon to perform the services required; and that thereupon the plaintiff did employ the defendant, Frank C. Larimore, a learned experienced and skillful surgeon, and the defendant, Daniel S. Coleman, to render such services as his case required.

This defendant further says, that he never had charge or control of the case and never was in any way responsible for the treatment thereof, the same being by said plaintiff wholly intrusted to other persons than this defendant; and he denies each and every other allegation of the plaintiff's petition, not expressly admitted by him to be true.

The defendant, Frank C. Larimore, says that he admits that on the 12th day of August, 1893, the plaintiff was injured as alleged in his petition; he admits that this defendant held himself out to be a surgeon, and was, on said day, employed by the plaintiff to reduce said fracture and set said broken bone, which work this defendant says he then and there did in a careful, proper and skillful manner; that this defendant with his own consent, was by the plaintiff discharged from all further care or responsibility of treating said injured leg. He denies that he was in any way negligent or unskillful in his treatment or management of plaintiff's injured leg. And for a further defense, this defendant says that if plaintiff's said leg is now deformed or crippled, or painful the same is wholly the result of said injury, and of plaintiff's own misconduct, negligence, and disobedience of this defendant's instructions in regard thereto; and he denies each and every other allegation not expressly admitted by him to be true.

The defendant, Daniel S. Coleman, admits that on the 12th day of August, 1893, the plaintiff was injured as alleged; that he, this defendant, at that time was a surgeon; and for his defense, he denies that he was ever employed by the plaintiff to reduce said fracture or set said broken bone, or that this defendant ever undertook to do the same, or ever had anything whatever to do with plaintiff's injured limb, until the said fracture had been reduced and said broken bone set

by the defendant, Frank C. Larimore; after which this defendant did, at the request and instance of the plaintiff, visit him, the said plaintiff, and look after, treat and dress said injured leg, all of which this defendant did in a careful, proper and skillful manner.

And for a further defense, this defendant says that if plaintiff's said leg is now deformed or crippled, or painful, the same is wholly the result of said injury, and of plaintiff's own misconduct, and disobedience of this defendant's instructions in regard thereto; and he denies each and every other allegation of the plaintiff's petition not expressly admitted by him to be true.

To the answer of the defendant, Frank C. Larimore, the plaintiff has filed his reply in which he denies that said Larimore carefully or skillfully reduced the fracture of said broken bone; denies that the defendant, Larimore, was discharged by the plaintiff from further care and treatment of said injured leg; and he denies each and every other allegation in said answer contained.

In reply to the answer of the defendant, Daniel S. Coleman, the plaintiff says that he denies each and every allegation set forth and contained therein.

These pleadings make the issues you are to decide, after carefully considering and weighing all the evidence introduced during the progress of this trial.

The burden of proof is on the plaintiff; and he must satisfy you, by a preponderance of the evidence, of the truth of all the material facts in issue necessary to entitle him to recover.

By "burden of proof" is meant the burden or duty of satisfying the minds of the jury, of the truth of all the material facts alleged by the plaintiff and denied by the defendant.

By a preponderance of the evidence is meant that degree of evidence, produced in proof of facts, which, in the minds of the jury, outweighs all the evidence to the contrary. It is such evidence as inclines the minds of the jury to believe the facts that constitute the claim of the plaintiff, rather than the facts upon which the defendants rely for a defense.

This is a civil case, and not a criminal case that you are now trying; and you should bear in mind the distinction be-

tween a preponderance of the evidence, which is all that is required to turn the scale in favor of the plaintiff in civil cases, and prove beyond a reasonable doubt which the state must always produce before the jury can convict in criminal cases. You should remember that you are required to find by a preponderance only of the evidence, if you find for the plaintiff in this case, and not beyond a reasonable doubt.

And now, gentlemen, I will instruct you as to the respective duties and responsibilities of a surgeon and his patient. If a person holds himself out to the public as a physician surgeon, the law requires him to possess and exercise ordinary skill and knowledge in his profession in every case of which he assumes the charge, or undertakes to treat. He is not required to possess the highest degree of knowledge and skill which the most learned and skillful in his profession may have acquired, but he is bound to possess and exercise, in his practice, at least the average degree of knowledge and skill possessed and exercised by the members of his profession generally.

A surgeon who holds himself out and offers his services to the public as a surgeon, impliedly contracts with every one who employs him, that he has ordinary knowledge and skill in his profession; and also, that he will use reasonable and ordinary care and diligence in the exercise and application of his skill and knowledge, to accomplish the purpose for which he is employed; and if he does not possess an ordinary degree of knowledge and skill, or is negligent and careless in his treatment of his patient, and injury results to his patient by reason thereof, without any fault or negligence on the part of the patient, the surgeon would be liable in damages to his patient for the injury caused by his negligence or unskillfulness.

It is the duty of the surgeon, when he takes charge of a case such as a broken femur bone, to give his patient all necessary and proper instructions as to what care and attention the patient should give his broken limb, in the absence of the surgeon, and the caution to be observed in the use of the limb before it is entirely healed. And it is the duty of the patient, and he is bound to adopt and follow out

all reasonable directions and requirements of the surgeon, relating to the treatment or care of the injured limb; and if he does not do so, and injurious consequences result from his failure to do so, he cannot recover damages from the surgeon for want of skillfulness, or for negligence on the part of the surgeon.

By taking charge of a case a surgeon does not thereby guarantee to effect a cure, or restore the broken limb to its normal condition and usefulness. There is no warranty on the part of the surgeon to effect a cure, unless made by a special contract. But there is an implied contract that the surgeon possesses that reasonable degree of skill ordinarily possessed by his profession; and that he will use reasonable and ordinary care and diligence; and he is not responsible for want of success, unless it is shown to result from a want of ordinary skill or ordinary care and diligence.

The first question you are called upon to determine, gentlemen of the jury, is whether the defendant, Dr. Welker, about the time of the injury to the plaintiff, held himself out as a surgeon; whether he assumed the duty and responsibility of treating the plaintiff's injured limb; that is, whether he was employed by the plaintiff or the relation of employer and employee was created between them; whether he informed the plaintiff that he would not assume the responsibility of treating the plaintiff's limb, and that he, the plaintiff, must procure some other person more competent than he to undertake that service.

These are facts in issue between the plaintiff and the defendant, Dr. Welker; and the plaintiff must satisfy you, by a preponderance of the evidence, that Dr. Welker did assume the duty and responsibility of a surgeon in treating the plaintiff's broken limb, or his case as to Dr. Welker will fail. If the plaintiff has proved to you, by a preponderance of the evidence that Dr. Welker did assume the duties and responsibilities of a surgeon in the treatment of plaintiff's injury, you will next consider the next question that arises in the case. If you do not so find, then the defendant, Dr. Welker, would not be liable to plaintiff in this case, and without considering the evidence any further as to Dr. Welker, your verdict

would be for him, whatever you find as to the other defendants.

The question of employing the other defendants you are not called upon to decide from the evidence, for it is admitted by the defendant, Dr. Larimore, that he was employed by the plaintiff to treat the plaintiff's broken limb, by adjusting the pieces of the bone, or setting it as it is commonly called; and it is admitted by the defendant, Dr. Coleman, that he was employed by the plaintiff to dress and take care of it, after it had been set by Dr. Larimore. And these defendants further admit that they are, and were surgeons at that time.

The next question in its order, for you to determine from the evidence, is whether the defendant, or those of them you find were employed by the plaintiff, and assumed the duties and responsibilities of surgeons, possessed and exercised a reasonable and ordinary degree of skill, as surgeons, in the treatment of the plaintiff's limb.

If you find, by a preponderance of the evidence, that the defendants, or any of them, did not possess and exercise a reasonable and ordinary degree of surgical skill, in the treatment of the plaintiff's broken limb, and damages resulted to the plaintiff by reason thereof, without any fault on the part of the plaintiff that contributed to his injury, the defendant or defendants failing to possess and exercise ordinary surgical skill, would be liable to the plaintiff for the injury resulting therefrom; if you do not so find they would not be liable on that account.

The next question for your consideration is whether the defendants, or any of them, were guilty of negligence in treating the plaintiff's limb. The law does not presume negligence. It must be established by proof; and the burden of proving negligence, by a preponderance of the evidence, is upon him who alleges it. In this case the burden of proving negligence in the defendant, or any of them, is upon the plaintiff. The fact that the plaintiff's limb is now in a crippled and deformed condition, if you find the fact to be so, does not raise the presumption that that condition was caused by the negligence of the defendants, or any of them; but the plain-

tiff must prove affirmatively, by a preponderance of the evidence, that there was negligence in the defendants, or one or more of them, in the treatment of plaintiff's limb, before they, or any of them, would be liable in damages to the plaintiff on that account.

In this connection you will consider the question made by the answer of Dr. Larimore. He alleges that what he did for the plaintiff was done with skill and care; that he did set the plaintiff's broken bone, and was with his own consent discharged by the plaintiff from any further care or responsibility in the treatment of plaintiff's limb. If you find that this defendant was discharged by the plaintiff, as alleged by him in his answer, the court instructs you that he would not be liable to the plaintiff for the negligence or unskillfulness of any other person subsequently employed by the plaintiff to take charge of, and treat his injury.

You will also consider in this connection, whether Dr. Welker procured the services of Dr. Coleman on his own account, if you first find that Dr. Welker was employed by the plaintiff, or whether Dr. Coleman was employed by the plaintiff. This question you will understand is to be determined by you, only in the event that you find there was negligence on the part of the defendants, that produced the injury of which the plaintiff complains, without any fault or negligence on his part; otherwise, there would be no occasion for you to decide this question. If you find, by a preponderance of the evidence, that Dr. Welker employed Dr. Coleman to dress and treat the plaintiff's limb, on his own account, after taking charge of and assuming the duties and responsibilities of the case himself, and you further find, by a preponderance of the evidence, that the present condition of the plaintiff's limb was caused by the unskillfulness or negligence of Dr. Coleman in dressing and treating it, without any fault or negligence on the part of the plaintiff that contributed to his injury, then Dr. Welker with Dr. Coleman, would be responsible in damages to the plaintiff; for it would be negligence in Dr. Welker to employ an unskillful assistant, and the negligence

of Dr. Coleman, the employe, would be the negligence of Dr. Welker, the employer, if you find there was such employment, otherwise, Dr. Welker would not be liable for the injury resulting from unskillfulness or negligence of Dr. Coleman, if you find there was such unskillfulness or negligence.

The next question for you to decide and determine, is whether the plaintiff was guilty of negligence that contributed to his injury of which the plaintiff complains, if you find for the plaintiff on the question of unskillfulness or negligence in the defendants, or any of them.

The burden of proving contributory negligence on the part of the plaintiff, is on the defendants; and they must satisfy you, by a preponderance of the evidence, that the plaintiff was guilty of negligence that contributed to, or caused the injury of which he complains, as alleged by them, unless the plaintiff's own testimony raises the presumption that he was guilty of negligence that contributed to or caused the injury of which he complains, in that event, the burden would be upon the plaintiff to remove that presumption by a preponderance of the evidence; and whether the plaintiff's testimony raises such a presumption is a question of fact to be determined by you from his testimony.

The plaintiff was bound to observe and follow whatever instructions were given to him by his attending surgeon, as to the care to be taken, and use of his injured limb, if you find any such instructions were given, and if he negligently failed to follow the instructions given him, or purposely disregarded the same, and you find that such neglect or disobedience directly contributed to the injury of which the plaintiff complains, then he cannot recover in this action, although you find from the evidence that there was negligence or want of skill in the defendants, or any of them, that also contributed to his injuries.

If you find that no instructions were given to the plaintiff, yet, the plaintiff would be required to use and exercise such ordinary prudence and care in the use and treatment of his injured limb as would be expected of one not having any special knowledge of what would be required of a person in his condition; and

if he did not do so, but, on the contrary, was careless and reckless in the use of his injured limb, before it was sufficiently strong to be used, and that use contributed to produce the injury of which he complains, he cannot recover in this action, and your verdict should be for the defendants.

Ordinary care and prudence is the exercise of such care and prudence as ordinarily prudent persons would use, taking into account the extent of their knowledge and information of the matters involved, and all the exigencies of, and circumstances surrounding the particular case.

It is a familiar principle in the law of evidence, that the opinions of witnesses are in general incompetent; but an exception to this rule is that which allows the introduction of testimony by witnesses particularly skilled in a science, or is well informed in some particular matter, a thorough knowledge of which is not possessed by men in general; such, for example, as the science and art of surgery. This class of testimony is known as expert testimony. Witnesses have testified in this case, giving their opinions after having first shown that they possess knowledge of the science of surgery.

Opinions of witnesses are not desirable in any case where the jury can get along without it, and it is only admitted from necessity, and then only when it is likely to be of some value. But expert testimony, especially when it is conflicting, should be received by the jury with caution. I do not mean by that, that the testimony of expert witnesses is to receive no consideration. It is entitled to be considered by the jury in connection with their own knowledge of the subject of the inquirer and to receive such weight to which in their judgment it is entitled.

There have been offered in evidence, two photographic negatives, taken by the Roentgen or X-ray process, of the plaintiff's injured femur bone. Scientists, by the aid of that wonderful and mysterious force we call electricity, have discovered a process by which they are enabled to procure a photograph, showing the shape and size of the living human body, with a fair degree of ac-

curacy. The negatives offered here in evidence in this case represent the shape and size of the plaintiff's right femur bone, somewhat enlarged, at the time the negatives were taken, namely, Exhibit A, on the 24th day of October, 1896, and Exhibit B, on the 9th day of May, 1896. They differ some in appearance, and that is accounted for by reason of the fact that they were taken with the bone in different positions with regard to the apparatus used in taking them; Exhibit A showing the bone from front to rear, and Exhibit B from a different point of view. You are to take these negatives and consider them as approximately correct representations of the shape and size of the plaintiff's injured femur bone, at the time they were taken, and at the present time, for the purpose of aiding you in determining the extent of the plaintiff's injury, or in any other way in the consideration of the evidence in this case.

If you find, gentlemen of the jury, by a preponderance of the evidence, that the defendants, or any of them, assumed the duties and responsibilities of treating the plaintiff's injured limb, and that they did not possess and exercise ordinary surgical skill, or were negligent in the treatment of said injury, and damages to the plaintiff resulted therefrom, without any fault or negligence on his part that contributed to the injury, your verdict should be for the plaintiff, and against such defendant or defendants; if you do not so find, your verdict should be for the defendants.

If you find for the plaintiff from the evidence and under these instructions, you will then determine the amount the plaintiff is entitled to recover; and in considering this question you will take into account the pain and suffering, if any, undergone by the plaintiff, and arising from the injury caused by the unskillfulness or negligence, or both, of the defendants, or any of them, bearing in mind that you are to exclude from your consideration the pain and suffering caused by, and necessarily following the accidental injury to the plaintiff, but only that, as I have said, arising from the unskillfulness or negligence, or both, in the treatment of the plaintiff's injured limb. You will also consider the per-

manency of the plaintiff's injury, if you find it is permanent, and the hindrance or inability it causes the plaintiff, and will probably cause him in the future, in following his usual occupation in life; the annoyance it has caused, and will probably cause him and all the other consequences necessarily flowing from the injury caused by such unskillfulness or negligence. And from a consideration of all the evidence, you will return your verdict for such an amount as will, in your judgment, fully and fairly compensate the plaintiff for the injuries he has thus sustained. The plaintiff can recover for such damages only as naturally flow from and are the immediate results of the wrongful acts complained of; and in determining the amount of damages you should be governed solely by the evidence introduced, and you have no right to indulge in conjectures and speculations not supported by the evidence.

You are the sole judges of the credibility of the witnesses, and the weight to be given to the evidence. You have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor or frankness, their apparent intelligence, their interest in the event of the trial, and from all the circumstances appearing on the trial, which witnesses are worthy of credit, and give weight to their testimony accordingly.

If you find for the plaintiff, and against all the defendants, your verdict will be against the defendants generally, without naming them; if you find for the plaintiff, and against any one or two of the defendants, you will designate by naming in your verdict, the defendant, or defendants, against whom it is found, and also naming the defendant or defendants, in whose favor you find; if you find for all the defendants, your verdict will simply be for the defendants, without naming them.

If you find for the plaintiff, and against any or all of the defendants, you will find the amount the plaintiff is entitled to recover and return your verdict for that amount.

Consider all the evidence in the case, give it such weight to which in your judgment it is entitled, and from a full

and fair consideration of all the evidence, decide the issues between the parties, and render your verdict accordingly.

On retiring to your room you will choose one of your number foreman, and after having agreed on a verdict, reduce it to writing on the blanks that will be furnished you, and return it, sealed, into court.

The cause is now in your hands, gentlemen, and you may retire to your room for deliberation.

Verdict for defendants, generally.

*Ewing and Ewing, Critchfield and Graham and S. M. Hunter, Attorneys for Plaintiff.*

*Cooper and Moore, J. B. Waight and W. L. McElroy, Attorneys for Defendants.*

## SUPREME COURT OF OHIO.

### Official Record of Proceedings.

#### New Cases.

New cases filed in the Supreme Court since Aug. 25, 1897.

5684. *The B. & O. R. R. Co. v. John Robinson.* Error to the circuit court of Knox county. J. H. Collins, for plaintiff. Critchfield & Graham, W. C. Cooper and J. B. Waight, for defendant.

5685. *William J. Shields v. John T. Murphy.* Error to the circuit court of Licking county. S. M. Hunter, for plaintiff. Edward Kib'er, for defendant.

5686. *The Phenix Insurance Co. v. The Port Clinton Fish Co. et al. Assignees.* Error to the circuit court of Ottawa county. Dickey, Brewer & McGowan and Wm. Gordon, for plaintiff. C. I. York and E. G. Love, for defendants.

5687. *Susan Crisweld v. Harrison Crisweld et al.* Error to the circuit court of Stark county. Meyer & Piero, for plaintiff. John H. Sponsell, for defendant.

5688. *Orson A. Britton v. The Chelson Jute Mills.* Error to the circuit court of Cuyahoga county. Louis J. Gossman and Long and Long, for plaintiff.

5689. *Mary Magdalena Kuhns v. Teresa Riegler et al.* Error to the circuit court of Stark county. Day, Lynch & Day, for plaintiff. Clark, Ambler & Clark, for defendant.

5690. *E. D. Smith v. The Merchants' & Farmers, Bank of Blanchester.* Error to the circuit court of Clinton county. Smith & Savage for plaintiff. Mills & Clevenger, for defendant.

5691. *The State of Ohio v. Ephriam U. Ride-nour et al.* Error to the circuit court of Paulding county. W. F. Corbett for plaintiff. Snook & Wilcox, for defendants.

5692. *Sargent P. Peabody v. The Bending Mfg. Co. et al.* Error to the circuit court of Franklin county. J. H. Collins, E. B. Dillon and Richard Jones Jr. for plaintiff. John J. Stoddart, for defendant.

5693. *The John Hancock Mutual Life Ins. Co. v. William M. Warren.* Error to the circuit court of Delaware county. W. J. Davis and Geo. K. Nash, for plaintiff. F. M. Marriott and J. S. Jones & Sons, for defendant.

5694. *Edward Isaac v. Louis J. Grossman,* assignee. Error to the circuit court of Cuyahoga county. Arthur A. Stearns, and Nathan Loeser, for plaintiff. Wm. H. Beavis, for defendant.

5695. *C. Harrington et al. Ex'rs. v. William W. Watkins, Rec.* Error to the circuit court of Ashtabula county. Northway & Perry, Tuttle & Tuttle and Washington Hyde, for plaintiffs. Hoyt & Munsell, for defendant.

5696. *Alice B. Grandin et al. v. William A. Goodman, Trustee.* Error to the circuit court of Hamilton county. Clement Bates, for plaintiff. Clement Bates and Follett & Kelley, for defendant.

5697. *The City of Toledo v. Anna C. Mott et al.* Error to the circuit court of Lucas county. W. A. Mills and Julian H. Tyler, for plaintiff. Hamilton & Kirby and Geo. A. Bassett, for defendants.

5698. *The City of Toledo v. Thomas C. Rowland et al.* Error to the circuit court of Lucas county. W. A. Mills and Julian H. Tyler, for plaintiff. Hamilton & Kirby and Potter & Emery, for defendants.

5699. *Charles H. Hoyt et al. v. The W. J. Morgan & Co.* Error to the circuit court of Cuyahoga county. William B. Beebe and A. A. Stearns, for plaintiff.

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No divorces are granted in Mexico. The courts for good and sufficient reasons, will grant a separation for forty years, but that is the most that can be done.

An unsigned, unattested sheet making an additional bequest, attached by a testator to his will after its execution, is held to be made effective as part of the will by a subsequent codicil. *Shaw v. Camp*, (Ill.), 36 L. R. A., 112.

A lien for a street assessment is held to be by necessary implication prior in rank to an antecedent mortgage, where the city charter authorizes such assessments with a lien therefor without expressly declaring their right. *Dressman v. Bank*, (Ky.), 36 L. R. A., 121.

One who steps around behind the street car from which he alights and attempts to cross a parallel track without looking for an approaching car thereon is held to be guilty of such negligence as will preclude any recovery for injuries if he is struck by the other car. *Traction Co. v. Helms*, (Md.), 36 L. R. A., 215.

The judges of the circuit courts of Ohio met in Columbus this week, and fixed the terms for holding court in all districts for the coming year. Judge C. C. Shearer, of Greene county, was elected chief justice. Resolutions on the death of Judges C. H. Scribner, of Toledo, and Milton Clarke of Chillicothe, were adopted.

A public square in a town or village treated as such for more than eighty years, is held to be irrevocably dedicated for public use and the county court is denied the power to sell such square to private persons for the erection of private buildings thereon. *Sturmer v. County Court*, (W. Va.), 36 L. R. A., 300.

A suit to test the constitutionality of the act of the general assembly, under which official court stenographers are appointed in certain counties of Ohio, has been started in the Wayne county common pleas court. A. S. Thomas, an attorney, is the plaintiff, and James A. Newkirk, stenographer, and county auditor A. B. Peckinpugh and county treasurer A. W. Blackburn, the defendants.

An agreement between several persons to subscribe for stock for the purpose of establishing a co-operative store under the contract of three persons as directors with a division of the profits in proportion to the amount contributed is held, to constitute a partnership, and where the shares are made transferable a sale of some of them does not dissolve the partnership. *Carter, D. & Co. v. McClure, L. & Co.*, (Tenn.), 36 L. R. A., 282.

The lien of a judgment on land as against a *bona fide* purchaser is held not to be lost by failure of the clerk to enter it in the judgment docket where the statutes require it to be so entered and make the docket a record to be open for examination, with a provision for the liability of the clerk to another person injured by his neglect to enter a judgment and expressly declaring that all final judgments are liens on land for ten years after the "rendition thereof." *Johnson v. Schlosser*, (Ind.), 36 L. R. A., 59.

Judge D. W. C. Loudon, one of the most prominent lawyers in southern Ohio, died suddenly of neuralgia of the heart at his residence in Georgetown, last Sunday afternoon. Judge Loudon for many years presided over the common pleas court of Brown county and had always taken an active part in Republican politics. Two years ago he was the Republican nominee for congress; but was defeated at the polls. His death was a great shock to his extensive circle of friends. He had been enjoying perfect health and on last Saturday appeared in court as counsel in an important case. He was 70 years of age.

Last Saturday, suit was commenced against the county commissioners of Champaign county by B. F. Church, administrator of the estate of "Click" Mitchell, who was hanged on June 4th, to recover \$5,000 damages provided by the Smith anti-lynch law, to the next of kin of a person meeting death by mob violence. The petition recites that Mitchell had two half brothers and two half sisters who were his next of kin; that he was confined in the county jail under sentence to the penitentiary on a felony; that an unlawful gathering of citizens, assembled to exercise correctional power, did inflict such injury by lynching as to cause the prisoner's death and judgment for the sum of \$5,000, as provided by the Smith anti-lynch law, is asked.

The Smith law fixes the amount of damages to be collected and prohibits a compromise. This feature of the law was declared unconstitutional by the common pleas court of Cuyahoga in the case of *Caldwell v. Commissioners*, 6 Dec., 367, this was an action for damages for personal injuries received by the plaintiff, during the recent strike of the Brown Hoisting and Conveyancing Co., of Cleveland. As the present action is the first in the state, commenced under the law for death caused by mob violence, the decision of the court will be awaited with interest.

#### DEATH OF HON. EDWARD H. FITCH

In the death of Hon. Edward H. Fitch, who died at his summer residence at Conneaut, Wednesday morning of last week, the bar of Ashtabula county has lost one of her foremost and most brilliant and respected members.

Hon E. H. Fitch was for many years prior to his death one of the leading attorneys of Ashtabula county, and was also well known in the profession throughout the east. As a boy he attended the Ashtabula public schools, and continued his education in St. Catharines, Ontario. Later he finished at Williams' College, in Williamstown, Mass. He was a classmate and close friend of the late President James A. Garfield.

October 17, 1870, Mr. Fitch was appointed by Governor R. B. Hayes, as

delegate to the National Capital convention at Cincinnati, from the nineteenth congressional district. Prior to this appointment he was elected a member of the house of representatives, discharging his duties with unusual ability and rare fidelity. In 1892, Mr. Fitch read an exhaustive paper before the Ohio State Bar Association on the "Torrens System of Registration of Land Titles," which was published. In 1893, Governor McKinley appointed a commission to formulate this system. Mr. Fitch was made chairman of this commission.

The philanthropic spirit which prompted Mr. Fitch's work in behalf of the Torrens' bill, made his interest in its ultimate passage one of deep import, and although the law was pronounced unconstitutional in Ohio, as a similar bill was in Illinois, he was very much encouraged at the meeting of the state bar association which he recently attended at Put-in-Bay, to find that the leading attorneys and business men of the state are unanimous in their indorsement of this system, and assured him that they would support future efforts to push it through in spite of the conservatism of the supreme court, and the existing state constitution.

He had devoted considerable time to scientific research, and since 1867, has been a member and a fellow of the American Association for the advancement of science.

Mr. Fitch was married in 1868 to Miss Alto D. Winchester, of Columbus. Eight children have been born of this union of whom five survive.

Mr. Fitch's death was a shocking surprise, not only to his friends but to the family, as but a few hours before it occurred there was every reason to hope that he would recover. He had been staying with his family at their summer home on the shore in Conneaut, and left a few days for Detroit, to attend the meeting of the American Association for the Advancement of Science, but he was taken ill when he reached Ashtabula, and, instead of continuing his intended trip, he went to his Jefferson homewhere he hoped to be able to return to Conneaut.

In private life Mr. Fitch was implicitly trusted and warmly loved. He was the

bulwark of his party, an honor to his community and to his country, his profession and to himself, and as such he left upon his fellowmen an impression that will not be effaced from the memories of those who knew him.

#### DOW TAX.

Attorney General Monnett, Friday of last week rendered an important opinion in response to an inquiry by auditor of state, Guilbert, in which houses of ill repute at which liquor is sold are held liable to the payment of the Dow law liquor tax the same as saloons. The sale of liquor in such places is prohibited under heavy penalties, but the opinion states that "notwithstanding all these state laws in full force the constitutionality of which has been passed upon in each case by the lower courts, complainants allege, that there are over 800 houses of ill fame and other places in the state where intoxicating liquors are sold contrary to law." After reviewing the statutes the opinion continues as follows:

"In conclusion, I therefore hold, that notwithstanding the criminal penalty above referred to, attaching wherein parties make sales in brothels and houses of prostitution, that when the sales have already been made or liquor has been given away, they will not be heard in law or justice to defend against the Dow tax, to say that they are selling liquor illegally.

"If that would be a defense and a mode of escape from paying the Dow tax, every saloon that wished to be dishonorable enough to become a law violator and refuse to pay the Dow tax could say they sold to minors and drunkards and were thereby doing an illegal business, or go so far as those defendants claim and become still worse violators of the law and start a brothel at each place where intoxicating liquors are sold and plead that in justification of their refusal to pay the Dow tax.

"You should instruct each county auditor, as I gave you a written opinion on a similar subject before, to forthwith place every such person so selling, upon the duplicate, file the proof with the prosecuting attorney, and if prosecuting

attorneys, sheriffs or police officers refuse to act, and wink at plain violations of the criminal laws of the state, county or city, they should be removed from office either by impeachment or quo warranto.

"Last year the State of Ohio collected off of dealers in intoxicating liquors, under what is known as the Dow law tax, \$1,002,478. As long as it is the policy of the state to charge each dealer \$350 for each place where such sales are conducted, the state owes it to them to see that the law is enforced against all alike, and not place a premium upon criminal evasions.

"I think it advisable to again call attention to the fact that under section 2 of said Dow law said assessment, together with any increase thereof and penalty thereon, attaches and operates as a lien upon the real property on and in which such business is conducted; that if such lien is properly placed therein by the auditor of the county, the owners of such real estate will be obliged to pay such taxes at the same time their other state taxes are paid, and in default thereof the property will be sold at delinquent tax sale. This lien would attach and operate for the liquor that had been sold on the premises and should not be evaded because the tenants or lessees were evicted or imprisoned under the other statute at some future time. If the estimate made is correct that there are 800 places as above described, now evading the paying of the Dow tax, the state and county treasuries are being defrauded of \$100,000."

#### MEMORIAL OF HON. JOHN J. HALL.

Late a Member of the Summit County Bar.

John J. Hall was born in Springfield township, Summit county, Ohio, on July 2, 1828, and he there passed the earlier years of his life. Employed substantially all the time at farm labor, he secured but a limited education in the country schools of that day, which was supplemented by attendance for about a year at Mt. Union Academy. He was married on April 18, 1854, to Miss Cynthia A. Jones, of Damascus, Columbiana

county, who survives him. His studies, preparatory for admission to the bar were pursued in the office of Edward Oviatt, Esq., at Akron, and he was admitted at Canton, Ohio, in the year 1857. From that time forward he gave his attention exclusively to the practice of his chosen profession, residing all the time at Akron where he died on the morning of September 4, 1897.

Although Mr. Hall's efforts in his preparatory studies and the early years of his practice were greatly impeded by reason of his limited educational advantages, yet he had an untiring industry, an unremitting application to his business, an absolute fidelity to interests of his clients as well as to all his engagements. He had a peculiar but forceful style of argument which was convincing and powerful because of his intense earnestness of manner, his blunt, direct and clear statement of his claims, and adding to all these tact and prudence in preparation for trial, an almost unerring judgment of men, a stalwart commanding figure, frequent sallies of wit and sarcasm, a capacity for repartee and an ingenuity which never failed to make the most of an opportunity for appealing to the sympathies of the jury. His efforts as an advocate produced an effect which it was often impossible to remove or even to parry; and last, but not least, through his rugged and unswerving honesty in all his dealings, he became, and was in the highest sense a successful lawyer during the last twenty-five years of his professional life.

Mr. Hall was an active and useful member of the American and Ohio State Bar Associations, from the organization of these bodies until his death. He attended every meeting of both until in 1896, when an almost fatal illness kept him at home. He served continuously on many of their most important committees, and in 1895 was elected president of the Ohio Association. He was always active and prominent both in and out of those organizations, in promoting improvement and reform in the administration of justice, in raising the standard of qualification for admission to the bar, and was especially zealous for everything that tended to advance the interests and reputable standing of

the members of his chosen profession.

His attendance at the meeting of the Bar Association together with his well known sociable and genial disposition, afforded him the opportunity, always very pleasing to him, to cultivate the acquaintance of the most prominent and able men of his profession. He was highly esteemed by many of the leading lawyers of the state and nation. He not only derived great pleasure from his extended acquaintance, but he made excellent use of it as a means for his own education and culture.

Mr. Hall always thirsted after knowledge, and during the last half of his life read and studied many of the best and choicest books in the English language. He was an eager and appreciative student of both history and literature, and having a good memory, his mental growth and advancement were marked and unusual.

The only official positions held by him were those of trustee of the Children's Home and member of the board of elections of the city of Akron. In both of these he has been accorded the highest praise by all who were associated or came in contact with him for his efficiency and faithfulness in the performance of official duty. Although he was an outspoken and uncompromising partisan in politics; yet his political opponents, who were associated with him officially, have testified heartily and uniformly to his unvarying fairness and unbiased action in all cases where his official conduct might have been turned to party advantage. As trustee of the Children's Home he was a most interested, watchful, intelligent and painstaking friend and protector of the wards of that institution and was looked to and relied upon as such by all who had official or other relations with him. His great fondness for little children was well known. No matter when or where he saw a child he gave it some fond attention and would if possible, take it in his arms before leaving it. Although brusque and at times rough in his manner, he had a very kind and tender heart. He always welcomed the young attorneys to the bar and was glad to favor and help them in every proper way.

His domestic relations were most exemplary and happy. Having no chil-

dren, he regarded nothing as a sacrifice which would add to the comfort, convenience or happiness of his wife; and never allowed anything to interfere with his attention and devotion to her.

The loss of such a man as this will be felt by his associates and by the community. To those who had felt his influence he must necessarily be missed. He is well worthy a of devout remembrance and we ask that a copy of this memorial be entered at large upon the journals of the court, and an engrossed copy, certified by the clerk be delivered to his bereaved and sorrowing wife.

A. C. VORIS,

C. S. COBBS,

J. M. POULSON.

Committee.

September 9, 1897.

#### ADDRESS BEFORE THE AMERICAN BAR ASSOCIATION.

[Delivered by James M. Woolworth, President, at Cleveland, Ohio, Wednesday, August 25, 1897.]

GENTLEMEN: I warmly congratulate you, that the Association, at this annual meeting, completes a period of its existence, and that what it has accomplished may be regarded with just satisfaction. In 1877, in answer to the suggestion of several gentlemen of the bar, a number of its members came together at Saratoga and framed the organization, which, without change beyond a natural development, continues to this day. Twenty years have passed away—a fraction of a century; one of those awful periods by which men measure the history of the race. These periods and fractions of them, a half, a quarter, a fifth of a century seem to have something sacred, and stir the imagination. We may very well, at this time, indulge ourselves in a few words recounting what has been accomplished.

The beginnings were small. At first, the Association did not greatly draw to itself the public attention, nor a large attendance of members of the profession. But, as the years went by, its numbers increased, including lawyers residing in every one of the states and territories, and what has been done at the annual meetings has excited general interest

throughout the country. The practical results have answered all reasonable expectation. The influence of the Association has been strongly felt in the movements in behalf of legal education, the uniformity of the laws, the expansion of the federal judiciary, the enlargement of the sphere of international law, and other efforts to increase the usefulness and dignity of the profession and assist the administration of justice. Besides, the papers, addresses and reports which have been sent forth form a contribution to the literature of the law and to the science of jurisprudence of great value and interest. Membership in the Association is esteemed in all parts as a distinction; its honors are valued as of consequence; its works is being enlarged so as to include many subjects of public interest; and its opinions upon important measures are coming to be more and more respected. That the Association may grow and prosper is the wish of every member of the profession and of all good citizens.

The pleasure of congratulating one another to-day for what has been stated, is qualified by two events of melancholly interest. Since our last meeting, the Honorable John Randolph Tucker has died. He was president of the Association in 1892-3; delivered the annual address in 1892, and read a valuable paper in 1888. He was a familiar and conspicuous figure at our meetings. His gracious and impressive personality, his wide and generous cruidition, and his enthusiastic devotion to his chosen profession as a teacher of the law made him an unique and interesting character. His public services and private virtues make it fit that at this meeting some special notice be taken of his death.

In 1893-4, the Honorable Thomas M. Cooley was president of the Association. His address was of exceptional wisdom and power. In 1881 he read a valuable paper.

His books on various branches of the law are very useful and are held in the highest esteem. His services in judicial and quasi judicial stations, extending through many years, cannot be over-estimated. Under the weight of great age, he has been withdrawn from any further share in the affairs of this world,

and he now awaits the summons to another. You may think it proper to communicate to him some expression, in the hope that he may, before the end comes, apprehend the deep sincerity of your respect.

During the year, gentlemen of great respectibility interested in the National Association of Credit Men have sought conference with me, with a view to joint action of their society and ours in an effort to secure legislation looking to the suppression of fraudulent practices of insolvent debtors. Their propositions seemed to me expedient and useful, but I do not feel authorized to go farther than express a personal sympathy with their efforts. You may think it wise to direct the executive committee or the committee on Uniform State Laws, to confer with the organization with a view to united action, in behalf of legislation on the subject in which it is specially concerned.

The chairmen of most of the local councils, some at personal inconvenience, have secured for my use copies of the statutes enacted at the last sessions of the legislatures of their respective states, and have furnished me valuable notes upon such of those statutes as they thought of general interest. The acts of legislatare of California, New York, Colorado, Florida, Iowa, Nebraska, Pennsylvania, Texas and West Virginia have not been issued in time to reach me; but notes of the chairmen of the local councils for California, New York, Pennsylvania, Texas and Florida enable me to measurably apprehend the nature of the legislation of those states. Georgia, Louisiana, Ohio, Vermont, Virginia and Maryland and the Indian Territory have biennial sessions, which did not fall in the past year. In Delaware and Oregon no acts of a general nature were passed. The following review covers acts of congress and of the legislatures of the other states.

This great body of statutes comprehends, on the one side, the legislation of congress, and, on the other, the acts of the council of the Cherokee Nation. The one concerns a great people of 77,000,000 souls, occupying a large part of a great continent, with various, intimate and complex relations with all the nations of

the earth; the other is the feeble imitation of civilized government by a community, which, within a few generations, has partially abandoned the usages of a nomadic people. Between the two, are ranged a miscellaneous mass of statutes, the general principles of which are homogeneous and follow the lines of former legislation.

(Here Mr. Woolworth enters into a very full review of the legislation of congress and the legislatures of the several states where the same were in session during the past winter.)

#### UNIFORMITY OF THE LAW.

Connecticut has adopted the proposal for amending and codifying the law of negotiable instruments. Persistence will bring one state after another to do so; the first step will then be taken to unify the laws. This cursory review of the legislation of the past year suggests several interesting considerations. One is, that, while the effort to harmonize the laws of the several states have not been as successful as was reasonably expected, there is a singular uniformity in the statutory enactments of the states. Our people are spread over a vast arena of territory; they are distributed among fifty states and territories; the industries of these communities are diversified, and it seems reasonable that the habits of life though in one section should greatly differ from those of another. And yet it is a remarkable fact that the same subjects occupy the attention of the legislatures in all the states, excite the same feelings, sentiments and passions everywhere, and are dealt with by all in substantially the same manner. Uniformity comes of itself, and need to be promoted only in comparatively few directions. The fact is significant. It teaches us that we are one people, one nation; all the parts having a consistent form of organization, common methods of political and social action, common instincts, aspirations and destiny. With such a development of the national life, there is no room for sectional prejudices, and whoever seeks to excite them is not a good citizen.

Another consideration suggested by this review of the legislation of the past year, is the increasing vigor of the police power. Nine-tenths or more of the

statutes were passed in its exercise. The activity of that power must necessarily increase as society becomes more and more highly organized; but with us it seems to outrun necessity; like children we are apt to do, for the sake of doing. But there is more than that. There is a disposition, which hardly brooks restraint, to make use of government in aid of one class of citizens, or one kind of interests at the expense of others, to intrude into the affairs of individuals, and to encourage them to rely on what can be done for them, rather than on what they do for themselves.

This leads me to some general observation upon this tendency.

Our country is approaching an interesting conjuncture. I do not wish to exaggerate its gravity; it is impossible to underestimate it. But a fair and true estimate of it and of its issue will assist in conducting to their solution. In the course of our history, one question after another has presented itself, each in its turn seeming to involve the integrity of the whole social system; but the country has always come out of the disturbance and trouble, without suffering detriment. Indeed, when the crisis has been most alarming, and the popular instincts, emotions, passions and intelligence have been aroused and carried to a great height of agitation, the stress and strain and hazard have passed, leaving a renewed vigor, and a replenished and sometimes regenerate spirit. Our various experiences have issued so happily, that there has come to be among the people a consciousness of destiny, and a belief in Providence which has us in a gracious and safe keeping. Accordingly, when at the period we have reached, we take a look back over the course traveled since the days of the founders of the republic, these crises and their issues, these agitations, disturbances and troubles, afflictions and agonies of conflict lose somewhat of their several consequence and moment, and fall into the order of a consistent development. The way, as has been trodden day by day, after holding one direction for a time, has seemed to turn sharply aside, and then going on again for a distance to return somewhat to the former course, ascending activities

sometimes, and sometimes decending into the abyss; but, seen from afar, the devious line is straightened, the inequalities disappear, and a progress direct, certain and steady lies before the view.

The conjuncture, therefore, which I foresee, like those which have been before, however serious it may seem at the present moment, it is not just cause for fear. At the same time, in the midst of all our confidence, we must not shut our eyes to what is impending, but take good measure of it, and gird ourselves, so as to give the help our country needs, in order that she may come forth happy, successful and regenerate. Without keeping you longer from the issue, I may state it thus: the system, political, industrial and social, which our fathers founded, the doctrines and postulates, the methods and institutes of that system are on one side. On the other, new forces, theories, maxims and dogmas alien and hostile to those heretofore unquestioned are being brought forward; already they have gained such acceptance, that they have begun to introduce themselves into our institutions; they are of such novelty, vitality and intemperance, that if once they gain sway, there will be a new heaven over our heads and a new earth below our feet. I must beg your indulgence while I state the radical truth from which our institutions have sprung, and had a consistent development. Not that I have anything new to say; the whole matter is familiar. But sometimes a statement of what is old is a good beginning for considering, measuring, testing and exposing a mischief that is new.

The Declaration of Independence set forth these truths as "self evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." These truths are declared to be self-evident; that is, they are intuitively apprehended and are beyond the necessity of proof; they are unchangeable in their nature, and of such general application that they are acknowledged

by all moral agents who are susceptible of moral truth. The declaration that all men are endowed with a right to "life, liberty and the pursuit of happiness" is not satisfied by assuring and existence as animals, nor by freedom from physical restraint. That is the smallest part of their contents. Each by itself is a great word—the greatest, tongue ever uttered. But one reflects its meaning upon the others, so that all of them coupled in one phrase encompass the exercise of all the faculties and capacities of men, so as to give to them their highest enjoyment. Thus, there are the callings in life, trades and pursuits which have always been followed in all communities from time immemorial. The right to pursue them, without let or hinderance, is an ingredient of happiness, without which, life is not worth living, nor liberty worth having. And then, furthermore, there is the exercise of the faculties and capacities of men in complex, highly developed, industrial societies, which gives to them a vastly higher enjoyment; as where men subdue the forces of nature to their service, and where they combine and associate together for ends beyond the competency of individuals. These last as well as the former are the fruition of the liberty of American citizens which they claim as their birth-right. The object and justification of governments among men is to secure these rights in full measure and proportion; and any exercise of power, whether by edict or Emperor, decree of Parliament, or act of Legislature, which lays upon them a burden of any sort is without defense, apology or excuse.

This goes far beyond any theory of society man ever knew until July 4, 1776. And how has it happened that our forefathers apprehended these truths so much more vividly than any other people? It is said that they came down to them from other generations. This maxim, that all men are born equal, is said to have been transported from Rousseau and other French writers, who in turn read it in an edict of Louis X, who resigned early in the fourteenth century, and that he or some one before him had it from the jurisconsults of the times of Antonines. And other maxims of liberty, which were wrought

out in the great transactions of English history are said to have been brought over here as the heritage of Englishmen. All which is curious, but it misses more than half the truth. The first settlers along the Atlantic coast and those who kept filling the great procession which streamed hitherward down to the time of the Revolution, the English country gentlemen in Virginia and Maryland and the Puritans of Massachusetts, the Huguenots of South Carolina and the Dutch of New York and New Jersey, were men of fibre and strain such as the founders of states never had before, and such as the people they left behind never had or did not long retain. Why this was so is easy to explain; but the inquiry is irrelevant. It is enough to state the fact. And when once they were settled here the air of Heaven was so free, the space of God's earth was so broad, the new things of their experience came to them in such strange abundance, that the nature within them, stalwart, virile, and full of hope and force, swelled to an affluent and opulent life. Liberty was in the fibre and nerves and blood of those men: it was not a lesson they had learned. That explains why the tax and the stamp tax and other exactions, impositions and aggressions of George the Third, were not the cause but the occasion of the Revolution; why English tenures in Virginia and Manors in New York were dissolved, and statutes intended to penetrate the household and direct domestic, personal and private acts, habits and relations were never enforced and were soon repealed; why, in the earliest days, the Court in Massachusetts interpreted the phrase in the bill of rights of 1780, that "all men are born free and equal" as a declaration of the emancipation of slaves; and why the self evident truths of the muniments of our liberties, working in the disturbed conscience of the people, exploded under the foundation of the constitutional guarantees of slavery. That is the story, told in a word, of American liberty.

"Glittering generalities," a most brilliant advocate called the self-evident truths of the Declaration. Possibly so; indeed, certainly so, if you stop with that instrument. But when they were

realized in the conscience, and embedded in the moral constitution of the people, and interwoven with all the filaments of the heart, so as to give tone and temper to the common life, and appear and reappear in the very efflorescence of popular sentiments, instincts, impulses, emotions and passions, they became transcendent, vital and all-governing facts. And so it is not strange, it is just what we should expect that these "glittering generalities" were more particularly stated and defined in the constitutions, in other words to be sure, but words of the same meaning, sense and import; that is to say, no person shall be deprived of life, liberty or property without due process of law; private property shall not be taken for public use without just compensation; and the many other clauses, by which these fundamental rights, privileges, immunities and franchises are assured; such as those guaranteeing free elections, free speech, justice administered without denial or delay, the privilege of the habeas corpus, trial by a jury of the vicinage, and so on and so on.

And thus, reversing our steps, we trace these mandates, prohibitions and guarantees of our constitutions back to the comprehensive phrase of the Declaration of Independence, that governments are instituted to the end that each and every man may exercise all his faculties in whatever way he may, according to his own judgment, choose, so as to derive from them his highest enjoyment. The citizen, the person, the individual—living his own life, cherishing his own aspirations, making and meeting his own destiny, he is the integer; he is sacred; for him are all the solitudes. To conserve his rights, consistently with those of others, and to give him opportunity to work out his own happiness, without responsibility from others to him, governments are instituted. For these purposes are all the complex system of laws, the vast scheme of administration, the splendor and majesty of the immortal state.

It is not for a moment to be thought, that this force, seated deep in the virile nature of the founders of the Republic, was satisfied by its expression in the muniments of American freedom, or by its embodiment in political institutions.

It was of vastly more pervading potency and promise. Equality before the law is a tremendous truth. But there is another equality; it is the equality of all men in the competitions and rivalries of life. Under our system, the gates and avenues to the arena of industrial enterprise and adventure are open to all who will run the course—the start in the race is equal for all; there is no favor for any, and the best wins. That is the end and consummation and fruition of the equality unto which Americans are born. There never were here classes favored by law; that inequality our fathers never could bear. The highest education was, perhaps, at one time within reach of the few; but that advantage long since became common. Any deserving boy, may, by his own hands, earn the best instruction in the great universities. The ranks of our own profession the chief places in the public service, the laboratories of triumphant science, the marts where the most stupendous transactions of commerce are conducted, are filled by those who started even with all others, or if there was any inequality, the chances were against those who have won the race. Our social as well as political system is illustrated by comparison with that of England, the foremost of all European nations in the institutions of freedom. The history of the English people during this century is a strange story of the political enfranchisement of the people—first one class and then another being admitted to a share of political power, until today but a remnant of inequality remains. Where our forefathers were at the beginning, there Englishmen have come. And now another process is just being entered upon. A recent writer of singular insight says his countrymen "are definitely entering on a stage when the advancing party is coming to set clearly before it, as the object of endeavor, the ideal of a state of society in which there shall be at last no law protected, powerholding class on the one side, and no excluded and disinherited masses on the other—a stage in which, for a long period to come legislation will aim at securing to all the members of the community the right to be admitted to the rivalry of life, as far as possible, on a footing of equality of

opportunity." (Kidd on Social Evolution, p. 141.) Strangely enough the ideal state of society which is to be the object of endeavor in England, has long since been realized by us. The future there is the present and the past here, and the blessings foretold for Englishmen are fruition with us.

Against institutions justified by the self-evident truths of the Declaration and a social order whose development has proceeded on them, other forces are being set in array. Those who have given energy and direction to these alien and hostile forces and seek to drive them farther and farther, think they discover in modern industrial society and in the development and operation of its fundamental principle, evils that greatly transcend all that man has achieved. To them, the rivalries and competitions of life are virulent stimulants; they make the strong drunk with pitiless desire, and snatch from the unfortunate, however worthy, the rewards of their agony of toil. It cannot be denied that, in the end, the equalities of rights and opportunity work out in some instances the widest inequalities and the rankest injustice, and that good men are sick at the sight of them. Great accumulations of wealth in the hands of some, and equal accumulations of want, ignorance, brutality, and mental and moral degradation upon the heads of others, go hand in hand. One seems to correspond with the other. In a measure they are related. Some assume that one is the cause of the other: they say that there is a law which "rivets the laborer to capital more firmly than the wedges of Vulcan did Prometheus to the rock." This exaggerates the relations of one to the other. One is certainly not the only cause of the other. But it cannot be denied that great accumulations of wealth in the hands of the few go along with the process by which the poor are crowded down in deeper depths of poverty; and, more and more, the multitude on the brink is precipitated into the abyss of hopeless misery, while their places are in turn filled by the industrious who beg for work and not for bread. Many cannot suppress a profound sympathy for the poor, and, almost in despair, cry out from the depths of their hearts, against a civiliza-

tion which cannot save its own victims. Professor Huxley indulges in the most discouraging views of modern civilization. He says, "I do not hesitate to express the opinion that, if there is no hope of a large improvement of the condition of the greater part of the human family, if it is true that the increase of knowledge, the winning of a great dominion over nature which is its consequence, the wealth which follows upon that dominion, are to make no difference in the extent and the intensity of want, with its concomitant physical and moral degradation amongst the great mass of the people, I should hail the advent of some kindly comet, which would sweep the whole affair away as a desirable consummation." Method and Results. Essay IX.

Such dissatisfaction with social conditions arising largely from the excessive activity of the natural right of every man to do the best for himself in the rivalries and competitions of life, have found expression in ways more emphatic than words. The legislation of the past twenty-five years has been largely directed to strengthen the lower and weaker classes against the higher and stronger, and equip the former against the latter for the struggle of life; and the instinct running through all classes approves this policy. The trend of opinion is shown in the character of measures which are not only matured in statutes, but are introduced, advocated and received with applause, although they fail of passage. Wild and extravagant propositions for the exercise of the powers of the state are sure of an intemperate advocacy in popular assemblies and certain public prints. So great is the impatience to end all social evils at a stroke, that the rights, consecrated in the Declaration of Independence and the Constitutions, are ruthlessly set at naught, and remedies devised with some respect for orderly methods are contemptuously spurned. Even the judges have sometimes used expressions which lead to state socialism. There is a phrase coined or appropriated by Lord Hale, two hundred years ago, that "private property when affected by a public interest ceases to be *juris privati* only." As he used it, especially in his own day, it was true. But in our time the rule has

been paraphrased to give a right to seize private property for public use without compensation, whenever as is said, it is used by the owner "in a manner to make it of public consequence and it effects the common good; an expression, which, if it means all it says, is fatal to civic righteousness. The new doctrine has its sect and its propaganda. It is not possible to set forth in detail its creed, but it may perhaps be stated well enough for our purpose thus: the ethical principle of the immortal State, the unity of a Nation with its generations, experiences and accumulations in which its citizens find their highest satisfactions, and of property, that is, my right to what is mine and your right to what is yours, which is incapable of surrender and will not tolerate usurpation, are figures of a diseased civilization and rags of worn out and cast off garments. The explanation of society, according to the new lights, is a question of economics; and, in this narrow field, the theory and postulate is that manual labor is alone deserving; that value is what labor adds to physical substances, to which the laborer is the only one entitled, and is the only one who ought to appropriate it; the issue of which dogma is that the man who employs laborers, paying them wages, and appropriates the value of their labor and above what he allows them, robs them of the product that is not his own. Let this not be thought to be an exaggeration or perversion. These are some of the phrases which one of the apostles of this sect uses in the course of the exposition and development of the dogma. "The growing perception that existing institutions are unreasonable and unjust, that reason has become unreason and right wrong, is only proof that, in the modes of production and exchange, changes have silently taken place, with which the social order, adapted to earlier economic conditions, is no longer in keeping. (Engel's Socialism, Utopian and Scientific, p. 45.) Again he says: "Side by side with the great majority, exclusively bond-slaves of labor, arises a class freed from directly productive labor which looks after the general affairs of society; the direction of labor, state business, law, science, art, etc. It is, therefore, the law of division of labor

that lies at the basis of the division into classes. But that does not prevent this division into classes from being carried out by means of violence and robbery, trickery and fraud." And this is declared to be "the germ of the whole of the social antagonism of today." The meaning of which is that accumulated and stored labor, such as seen in the splendid structures which line the streets of this beautiful city, in the products of its mighty industries, and the gains of its strenuous commerce, are not the property of those who hold the title deeds to them, but belong to some indefinable, incomprehensible, all-absorbing body called Society. Mr. George seems not bold enough to send all ownership to limbo. But he does contend that land is nullius filius. He says: "The essential character of the one class of things is that they embody labor, are brought into being by human exertion, their existence is non-existence, their increase or diminution, depending on man. The essential character of the other class of things is that they do not embody labor, and exist irrespective of human exertion and irrespective of man; they are the field or environment in which man finds himself; the storehouse from which his needs must be supplied, the raw material upon which, and the forces with which, his labor alone can act." And he concludes, "though his titles have been acquiesced in by generation after generation, to the landed estates of the Duke of Westminster, the poorest child that is born in London today has as much right as his eldest son. Though the sovereign people of the state of New York consent to the landed possessions of the Astors, the puniest infant that comes wailing into the world in the squalid room of the most miserable tenement house, becomes in that moment seized of an equal right with the millionaires. And it is robbed if the right is denied." The ideal society which they portray leaves the individual without motives, incentives, permissions and facilities to exertion, men lapsed into a state of crushing equality, life a dreary monotony and the state without functions to restrain the evil or protect enterprise, industry and self-denial. It is a condition in which all rights and duties are extinct

—all hopes, desires, cravings, appetencies suppressed. "He made a desert and called it peace." Better than that, are war and rapine and crime, toil, starvation and agonies of the worst days.

It is perhaps natural to stigmatize these doctrines as foreign importations, at which our people will not give more than an incredulous glance, and resent as an insult to American common sense the suggestion, that these vagaries and foolish fancies will find acceptance among us. But it is easy to perceive just grounds for apprehension. One cause for alarm is the literature which has within a few years been put forth, and the reception which it has met. Its volume is great. It is not now and then a pamphlet of ephemeral form and contents, but books of pretentious size and substance. The writers show a masterful grasp of social phenomena, a deep knowledge of the laws which govern them, and a rare power and originality in their explanation. They enliven their pages by flashes of truths, some of which are new and others seem new. Above all, deeply moved themselves by their revelations and animated by a lofty spirit, their periods are often all afire with intensity of longing, and the passions of hatred of what seems to them the bitterness of live and of history. This estimate is supported by the pages of Karl Marx in his book on Capital, which he calls a "Critical Analysis of Capitalist Production;" and of Henry George's book on Progress and Poverty, which on his title page he characterizes as "An inquiry into the cause of industrial depressions and of the increase of want with increase of wealth: the remedy."

If these books were left to grow shelf-worn with time and dust, it would be different. But they are not left alone. If you go to any public library and ask for one of them, you will find its pages soiled by the hands of many readers and inked by the pens of many copyists; and if you are curious to inquire, you will find that it is the mechanic and the laborer more than any other who draws them out. Thus this large body of intelligence is being penetrated by these teachings.

At this point two facts press upon the

attention. In the first place, while the wage-earners are men of like passions as other men, no better and no worse, and therefore to be expected to put their personal interests before those of others, yet they display a strange and enthusiastic loyalty to their class; so that if one section falls into trouble, those who are at the moment less unfortunate, contribute relief from their poverty with generosity. They exemplify the saying, "If one member suffer all suffer with it." The sympathetic strike is the expression of this passion. In the next place, the wage-earners submit to a discipline as rigid and severe as an army in battle. Each abdicates his free will, his judgment, his personal wishes and interests. He is no longer an individual, but an atom of a mass, the smallest part of a machine driven by a power greater than steam, and directed by the hand of the engineer at his pleasure. What this great body of the citizenship, possessed of political power, transported by the enthusiasm of self sacrifice, directed by a relentless discipline will be, when it becomes thoroughly saturated with these doctrines, it is not hard to divine. In that day, if it ever comes, the federations of labor, their battalions, enthusiastic, compact, disciplined, organized, and moving with one impulse at the word of command, when launched upon institutions under which they suppose themselves trodden down, will sweep from the face of the earth not corporations, syndicates, trusts and aggregated capital only, but all the whole order of industrial society as now organized.

What has been said is without profit if we stop here. Any explication, however accurate and impressive, of the principles of American society, political and industrial, and any warnings against the insidious introduction into that order of alien and virulent heresies will be vain, unless they excite to a search for a remedy for impending evils; antidotes for the blood poison. This profession of the law is great; there is no force like it in modern civilization. It can tear this noxious growth out of our system; it has the remedy in its hands. That fact makes what has been said apt and opposite to the occasion. The remedy which I venture to suggest, as that which our

profession is competent to administer, is the application of the mechanism of the law to the education of all in the rights and duties of citizens, to the end that they apprehend justice. A somewhat complex proposition needing explanation. The education referred to is not such as is to be had in the schools. They teach the principles of political morality, illustrating them by the manifold experiences of the race in the course of its evolution, and enforcing them by sanctions drawn from many sides, just as they teach the principles of personal morality; but unhappily one may know the former best and be a bad citizen just as he who knows the latter best may be a bad man. All that learning is very admirable and desirable; but it does not go far enough. The education implied in the statement must convey to the mind so vivid a notion of every right that to realize it is the one object of desire, and to infringe it rouses the whole man in arms. It informs, enlivens and invigorates the conscience, so that a man is as sensitive to a wrong as to a personal indignity. All the habits, prejudices and temperament of the man must be for his inviolable integrity. This high endeavor, purpose and practice is possible only after long continuance in the exercise of the rights and duties of citizens.

One of the ways of educating citizens in their rights and duties is by improving and defining the jury system, and making the service interesting to jurors, in the popular as well as the superior courts. The large number of jurors should be those reached or liable to be reached by the new heresies; and the office should be dignified by the character of the men called to serve in it and by the circumstances of the employment. The first qualification of the juror should be that he earns a decent living for himself and family; rigorously excluding all who, from whatever cause, do not do so. A ruthless rule sometimes, just as are the chances of life always. The term of service should be for several weeks, and twice the average wages be paid for it, and the place of employment be kept open. Judges and justices of the peace should be men of gravity, sufficient learning, common esteem and strong per-

sonality, who will direct the jury to the very right of the matter. When, after such a service, the juror returns to his usual employment he will carry with him the best fruits of the best education, training and discipline; namely, a capacity to discern and a disposition to render justice, and also a consequence among his fellows, increased vigor, and force multiplied, manliness and self respect elevated, so that he will be felt throughout his class as one wise and safe and true to guide the common sentiment and opinion. Heretofore, the jury system has been administered, especially in the courts of the justice of the peace, and I fear in the superior courts, in so lax, slack, accidental, indecisive and too often dissolute way, that it has become a method for the miscarriage of justice. Regulated, invigorated and popularized in such way as is proposed, it will become not only a safer method of justice, but will lead men to apprehend and esteem justice for themselves and all others.

There is another of the processes of the law which can be developed to the same end. Once a year men are sent out, under one title or another, with more or less authority, to ascertain the value of every man's property, to the end that it may be taxed accordingly. The inquiry he makes, or whether he makes any, in a matter committed to his discretion; and whether he act upon the information at his hand or according to his arbitrary pleasure is a question for his conscience, if he have a conscience. The whole thing is a secret and irresponsible process. The natural consequence is that the fees allowed by statute are a small fraction of what he receives for reduced assessments of the rich, and excessive valuations of the property of the poor. Our concern here is not with these mischiefs, but with the uses which may be made of this process for the education of the people. Commit the business to boards, the majority of which shall be wages-earners, having the qualifications of jurors. Let the board sit at convenient hours in a convenient place with open doors, and compel every property owner to attend, and in the presence of his neighbors, state what is necessary to determine the value of his

property, subject him to cross-examination by any other person, and let the result be publicly declared with the reasons for it. The interest of every man will be enlisted, not only in securing the lowest valuation of his own property, but the highest of that of others. The inquiry will be pressed with rigor on every side, but will come back in most cases to what is fair and equal, all things considered. Men who own property, much or little, it does not matter which, taking part in such questions, contentions and determinations, will hold their own rights and property by no weak and relaxed grasp, and will yield to others the rights they claim for themselves.

Another way may be opened through which all classes may be drawn into participation in public affairs. The democracy of the town meeting formerly had a large place in the political organization. In most states administrative officers and boards have crowded these popular assemblies out and shorn them of their useful powers. Officialism has superseded popular modes. Even where the town meeting remains, it has but a remnant of its former vigor. It is an institution of which great use may be made in counteracting the evil of socialistic tendencies that are gaining sway among us. If it were multiplied, so that one of them would not cover too large a territory nor include too many citizens, and every citizen could make himself heard and felt in it, the interest of the neighborhood be discussed and dealt with, and the initiative taken in great public movements, something would be done to bring back the civic satisfactions and contentments of our fathers. The political life would be again the popular life. The humblest would have his place made for him by himself. The intelligent wage earner who now revels in the theories and fancies of Marr and George will be recalled to the rights which are his beyond the reach of government, and to the duties the discharge of which affords him his highest enjoyments. He will feel the dignity of manliness and of citizenship, the vigor of self-reliance and the ardor of patriotic emotion. A people of such men will not yield to the lassi-

tude of a society which is without virility, adventure, industry and ambition.

Your acquaintance with the administration of the laws will suggest many other uses to which its methods may be put. I have mentioned only a few of the very simplest and most obvious; but they seem to be enough to show that we have in our own hands remedies for the mischiefs which at this time are most threatening. Those remedies are, whatever will make Americans, more than ever before, self-respecting, conscientious, competent and just citizens.

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*The growth of this paper during 1896 has been so marked that we confidently assert that it now has a greater circulation than any other Ohio law paper. It also contains so much more legal matter that we are justified in claiming it to be the leading paper in its class.*

The Republicans of Trumbull, Mahoning, and Portage counties, met in Warren, September 21st, and renominated by acclamation Hon. George F. Robinson of Ravenna for common pleas judge.

Stanley Struble, of the Cincinnati bar, has been admitted to practice in the United States circuit and district courts on the recommendations of H. A. Morrill, James R. Jordan and Edward J. Dempsey. W. F. Fox, also of Cincinnati, was admitted on the recommendation of Joseph L. Adler, Harlan Cleveland and Charles T. Greve, of the Cincinnati bar.

Hon. Robert G. Corwin died suddenly at the home of his daughter, Mrs. C. A. Pauly, at Avondale, Cincinnati, September 16. At the time of his death the deceased was 82 years of age, and the news of his death was a great shock to his many friends.

Robert G. Corwin began the practice of law in 1836 and in 1839 was married to Miss Eliza Buren, of Dayton. They made their home in Lebanon for nearly twenty years, and in 1853 moved to Dayton. In 1878 he returned to Lebanon, his native town, and shortly after retired from public life. Mrs. Corwin died about three years ago, and since her death, Mr. Corwin has resided with his children. He was a cousin of the late Governor Thomas Corwin, and was a close friend of President Lincoln. The deceased was an anti-slavery man, and during the time of slavery, his Warren county home was a regular station on the underground railway. Although a man who was deeply interested in his country's welfare, he never held any public office other than that of supervisor of internal revenue of Cincinnati. During his long career he has lived a christian life, and his death is deeply regretted.

The deceased leaves surviving him, three sons and two daughters: Col. D., Thomas and Quincy Corwin, and Mrs. Charles Mead, all residing in Dayton, and Mrs. Dr. Pauly, of Avondale.

Walter A. Thieme, of the Cleveland bar, died Wednesday afternoon of last week, at St. Alexis Hospital, Cleveland, after being confined to that institution for one week.

Mr. Thieme was a well known attorney. He was thirty years of age and leaves a wife, mother and two sisters to mourn his loss. The deceased was born in Cleveland and was the son of August Thieme, who in 1848 was a member of the German Parliament. The father came to Cleveland and established a permanent home and was at once recognized as the head of one of the city's eminent German families. He started the *Anzeiger*, a well known German newspaper, and in many other ways was identified with the welfare of Cleveland.

The deceased studied law in Ann Arbor, and was closely identified with Judge Solders. He was a prominent Democrat, and at one time was a member of the Democratic state executive committee.

#### RIGHTS OF WORKINGMEN.

There is perhaps no phrase which is so frequently made use of in the discussion relating to wages, strikes and boycotts in these modern times as that known as "the rights of workmen." It will be well to know what this phrase means and to ascertain if workmen as a class have rights different from those of other citizens.

The relation of employer and employee is well settled and involves freedom to contract and be contracted with and the right to work or not to work as the employee may see fit.

It is not illegal or criminal for any man to be the possessor of wealth or the means to carry on any business, and under our constitution and laws he has the right to be protected against all interference with the same. He has the right to determine what compensation he will pay for labor or any service to be performed, and no one has the right to compel him to pay any more than the amount which he has fixed. Freedom of action, which is inseparable from all freemen and from all American citizens, gives to every laborer

the right to work or not to work as he sees fit, and any interference with him in this regard is unlawful.

It is useless to go into any elaborate discussions of this matter and attempt to define the mutual and reciprocal rights and obligations of employer and employee further, for they may be all summed up as follows:

1. Workmen may combine lawfully for their own protection and common benefit.

2. They have a right to form guilds or labor unions and unite for the advancement of their own interests, the development of their order and to promote skill in their trade.

3. They have a right to determine the number of hours they will work each day, and to advocate and urge all employers to employ no one that is not a member of their organization or guild.

4. They have a right to use every lawful means to raise their wages or to secure any benefit which they can claim by law; but the moment they proceed by threats, intimidation, coercion, violence, obstruction or molestation in order to secure these ends, or where their object is to impoverish third persons, or to extort money from their employers, or injure their business, or encourage strikes or breaches of contract among others, or restrict the freedom of others for the purpose of compelling employers to conform to their views, or attempt to enforce rules upon those not members of their association, that moment they become amenable to the law.

In other words, "the rights of workmen are conceded, but the exercise of free will and freedom of action within the limits of the law, is also secured equally to the masters."

Combinations to effect a given purpose, if carried out by the use of unlawful means, become criminal conspiracies and can be punished by authority of law.—*Legal Adviser.*

#### LEGAL EDUCATION.

[A paper read at a meeting of the Commercial Law League of America, at Put-in-Bay, July 22, 1897, by H. H. Wilson.]

Nothing shows more clearly the change of sentiment during the last few years on the subject of legal education than

the almost unanimous opinion, expressed in these letters, as to the superior advantages of the law school over the practitioner's office as a place for the acquisition of the elementary principles of the law. While many recommend that the work in the school be supplemented by study in the office, but few would depend upon the latter alone to prepare for the bar.

Your committee is of the opinion that the tendency to leave the law office for the law school gives the greatest promise for raising the standard of the profession, and should be encouraged.

The office of an attorney is a *quasi* public office, and the state has the right and it is duty to determine who shall become such. The state denies to the individual the right to vindicate his rights or redress his wrongs in his own behalf. The state therefore necessarily undertakes to vindicate the rights and redress the wrongs of the individual citizen for him. For this purpose all of the machinery of the courts is, at a great cost, maintained by the state. To further carry out this purpose certain citizens are by the state licensed as members of a learned profession, entitling them to offer their services as men learned in the law.

The state not only has the right but it is its duty to see that none shall minister at her altars of justice except those whose character is a guaranty of faithful service, and who possess such knowledge of the law as makes them reasonably safe guardians of the rights of others. It therefore follows that the qualifications that shall fit one to be admitted to the bar should be directly, and legal education should be at least indirectly under the care of the state. It is not meant that the state should necessarily be in actual control of law schools, but it should determine what shall be the minimum requirements of their graduates to be admitted.

Where the state supports the law school it directly determines what shall be taught and how it shall be done. Where the law schools are not under the direct control of the state the character of their work will naturally be indirectly determined by the standard for admission to the bar fixed by the state.

It is therefore the opinion of your committee that legal education should either directly or indirectly be controlled by the state.

On the other hand the state should not offer a premium for entering any profession by furnishing without cost the technical education required for its practice. The natural laws of social equilibrium will best determine who and what members shall enter any given profession. It is not wise for the state to interfere with the working of these natural laws by giving pecuniary advantage to one profession or vocation over others. So, where the state undertakes to furnish legal education, as it may well do, it ought not to do so without cost to its beneficiaries and at the cost of the public. In other words where the state furnishes legal education it should be at the cost of those to be educated, except perhaps where the enterprise is new and aid is given to assist in its early development.

We, therefore, conclude that legal education should be directly or indirectly under the control of the state, but should not be a permanent financial burden to the state.

The marked tendency to require more preliminary preparation, a better general education, as a condition of admission to the law school, is fully supported by the correspondence of your committee. In the opinion of your committee a higher educational standard for admission to law schools is even a more important factor in raising the general level of the profession than the lengthening of the course of study in such schools, although the latter is also desirable.

The conditions of success at the bar are very different from what they were a century or even a half a century ago, and these conditions are every year growing more exacting. Many started in the law forty or fifty years ago with but meagre preliminary preparation, and have reached high places in the profession, who could not start now with like preparation and ever hope to reach the same relative rank.

Success in the study and practice of the law now demands long and thorough preparation. It demands a broad foundation in good general scholarship. We do not mean that one must neces-

sarily hold a college diploma before studying law. He may hold that and yet be very deficient in the rudiments of a good general education. True, the college or university is the best place in which to acquire a good general education, but it is by no means the only place where it can be had. Many of our great lawyers whose general education was broad and thorough were not college bred men. It is broad, general education that is demanded, and if it is acquired no one will ask where it was obtained.

The practice of law touches life at any point and with the growth of our civilization the demands upon the lawyer are necessarily more varied. There is no field of human knowledge into which his work may not lead him. There is no science, a knowledge of whose principles may not be of importance to him. Shall he then delay the study of law until he has mastered all other branches of knowledge? There would soon be room at the bottom as well as at the top of the profession if such a requirement were insisted upon. But because all knowledge cannot be acquired before entering upon the study of law, shall we abandon all hope and commence the study of this important and most exacting science with no previous preparation at all?

It is not so much in the acquisition of knowledge as in the intellectual training, that thorough, general education is a necessary pre-requisite to the successful study of law. One cannot delay entering upon the study of law, until he has mastered the science of medicine, merely because his first case may be one of malpractice; nor can he wait to master civil engineering, because he may at once be called upon to try a case involving the proper construction of a railway bridge. But he ought not to enter upon the study of law until by long, persistent and patient study of other things; he has acquired that power of mental concentration and endurance that will render success in the study of the law probable. In all schemes of education there are certain branches of knowledge that are permitted to be taken only after certain preliminary preparation has been made. This is, because, without such preparation there is no reasonable hope of suc-

cess in them. The law is difficult and obtruse, and the young man whose education is limited to the three R's ought not, for his own good as well as the public, to be permitted to enter upon the study of law with a view to its practice. It is not contended that all well educated people would make good lawyers, but it is true that no man will ever be likely to reach high rank as a lawyer without a fair general education acquired either in or out of the schools.

It is often urged that severe requirements of preliminary general education would exclude many who are destined to become the brightest ornaments. It may be said that the names of Clay, Calhoun and Webster would never have adorned the role of honor in the legal profession if a high standard of general education had been, in their day, required as a necessary qualification for admission to the bar. It must, however, be remembered that we live in a day when higher education forms a part of the great system of public schools. It may well be doubted whether any young man of our time, who has not the determination and energy to obtain a good general education, will ever attain distinction at the bar, either with or without its advantages. One can hardly conceive of a Clay, a Calhoun or a Lincoln, surrounded by our present educational advantages, entering upon the study of law without having laid a good foundation for it in general education. Neither will we believe that men like those would even in their day have been deterred from entering their chosen profession because of any reasonable requirement of preliminary preparation. It is more than doubtful whether even these great men could have entered the law fifty years later, and with no better education, achieved the same measure of success.

But what ever may be said of the isolated few, the geniuses of the race, there can be no doubt that a fair general education is every year becoming more and more essential to success at the bar. And even those who have attained distinction without it have done so, not because of their lack of preliminary training, but only by overcoming disadvantages arising from it. That a genius succeeds at the bar without general education, by no

means proves that the average young man can safely neglect the advantages which it confers.

The mere possession of a college diploma should not be taken to qualify one to study law, nor should the lack of it necessarily exclude him. It is preliminary training and mental development that should be demanded, not a college degree. It may not be essential that proficiency in any particular branch of knowledge should be shown. It is not accumulated knowledge, the possession of a mass of undigested facts, that qualifies one for the study of law, but rather intellectual acumen and mental development, which are, indeed, the distinguishing characteristics of true education. The well equipped lawyer is an intellectual athlete. He cannot delay entering upon his profession until he has acquired all the general knowledge he will need in practice, but he should delay until he has acquired something of that mental development and intellectual strength that gives him the power of concentration and sustained mental effort. There is no profession in which the power to master a subject thoroughly and quickly is so essential to success as in that of the law. Cases are often won or lost by the ability of the lawyer, or his want of it, to master in a short time the particular branch of knowledge involved in the controversy.

The successful lawyer must possess the power to acquire this knowledge after he finds that it is necessary for him to use it. The power to master in a single night, if necessary, the technical knowledge required for a skilful examination of an important expert witness may win an apparently hopeless case. No one can anticipate what, out of the infinite variety of human knowledge, will be required in the practice of law. It cannot be mastered in advance of entering the profession, hence the absolute necessity of acquiring something of the power to master it as the occasion may require. Advancing civilization adds to the complication of litigation and to the more frequent use of expert testimony. The sciences are every year playing a more important part in the administration of justice and the power to master them, when re-

quired, becomes ever more and more important to those who would reach a high rank at the bar.

When a thorough preparation for the study of law has been made the battle is already half won. The study of the law is rendered, not only more profitable, but much more easy and pleasant by such preliminary training. That which to the unprepared is often dry, irksome, difficult and mystifying, is to the well trained mind, interesting, pleasant, easy and clear.

No one will ever reach the higher walks of the profession who plods through its fields thinking only of the loaves and fishes its practice will bring to him. The empyreal atmosphere on the heights is breathed only by those who see in the law something more than the means of making a living—who can see in it a great system of principles, the growth of centuries, by which the social fabric is held together.

While the efforts now being made to raise the requirements as to general education of applicants for admission to law schools are worthy of all praise and encouragement that alone will not accomplish the object desired—the elevation of the profession.

So long as no preliminary preparation is required for office reading, with a view of being admitted to the bar, such a movement among the law schools is likely to defeat its own purpose. Its purpose doubtless is to raise the general educational level of the legal profession. If, however, a young man of limited general education is to be admitted to the bar, it were much better that he prosecute his study in a law school, surrounded by a scholarly atmosphere, than in a law office, where the educational level is perhaps no higher than his own. It will avail nothing to close the law school to those whose general education has not prepared them for the study of the law, if they can come to the bar through office reading, with no preliminary training and much less knowledge of the law itself than the law school would have given them. Unless the higher standard of preliminary preparation be also demanded as a pre-requisite of office reading, then such a demand on the part of the law schools is likely to lower

rather than raise the general educational level of the profession. Its tendency will be to compel many who would otherwise have entered the profession through the law schools to enter by office reading where no general educational qualification is required. There is but little wisdom in closing, with extraordinary care, one hole in the fence while another is left wide open. The remedy therefore lies in the higher standard of preliminary preparation for the study of law in the law office, as well as for admission to the law school.

This standard of education should be reasonably high and every candidate for the study of law, whether in the law office or in the law school, should, by proper examination under the control of the state, demonstrate that he possesses it before being allowed to enter upon his professional study.

The state should first examine applicants for the study of the law, and then after the professional study has been completed, examine again for admission to the bar. If this method should deter some from attempting to enter an arduous and over-crowded profession without the probability of success it may prove not only a blessing to them, but to the public as well.

The law schools must in the future as in the past devote themselves principally to the science of law. The art of trying a lawsuit must always be chiefly learned in the forum itself. Yet many practical hints may be given in the law school, especially if instruction is there given by those engaged in the active practice.

In the opinion of your committee much more can be made of moot court practice than is usually done. A complete system of courts should be organized in every law school and these courts should be provided with a complete set of dockets that are to be preserved.

Here the student should become familiar with the various steps in a law suit and the proper record of each step as taken; all the successive appeals may be illustrated and proceedings exemplified from the issue of the summons to the return of execution.

Business colleges succeed in duplicating the business of the best mercantile houses much to the advantage of the

student, and there would seem to be no reason why the law schools should not more nearly reproduce the real life of the courts and thus save the student from many annoying and expensive blunders.

The proper training of the future members of the bar is a subject well deserving our consideration, and the league is congratulated in so early taking advance ground in this matter by the adoption last year of the resolution above mentioned.

We feel that we cannot do better than to reaffirm the action taken a year ago on this subject.

## SUPREME COURT OF OHIO.

### Official Record of Proceedings.

#### New Cases.

New cases filed in the Supreme Court since Sept. 8, 1897.

5700. State of Ohio ex rel. George W. Franklin v. Charles Kinney, as State Supervisor of Elections. Mandamus. W. L. Rogers, C. B. Adgatz, Hamilton & Bentley, Jesse Huber, P. R. Kerr, Jas. W. Halfhill; John W. Roby, J. R. Longswarth and Cable & Parmentor, for plaintiff.

5701. B. F. Helman, Admr., v. The P., C. & St. L. Ry. Co. Error to the circuit court of Miami county. H. H. Williams and M. H. Gantz, for plaintiff. Frank Chance, for defendant.

5702. Philetus W. Tuttle v. Almira Bishop. Error to the circuit court of Ashtabula county. Theodore Hall, for plaintiff. Wade & Betts, for defendant.

5703. John W. Keller v. R. P. Ford et al. Error to the circuit court of Licking county. Kibler & Kibler and Fulton & Fulton, for plaintiff. Carl Norpell, for defendants.

5704. The W. E. Rowe Canning Co. v. W. H. Davis. Error to the circuit court of Highland county. Van Deman & Chaffin, for plaintiff. D. Q. Morrow, for defendant.

5705. W. V. Campbell, Admr., v. Elma Sidwell, Ex'x et al. Error to the circuit court of Belmont county. J. B. Driggs and W. V. Campbell, for plaintiff. C. L. Weems, J. C. Heinlein and H. F. Sheppard, for defendants.

5706. H. N. Whitbeck, Treas., v. Eliza, P. O. Crocker. Error to the circuit court of Cuyahoga county. M. G. Norton and Ford, Boyd & Crowl, for plaintiff. Wm. E. Adams, for defendant.

5707. Valentine Fries v. The Wheeling & Lake Erie Ry. Co. Error to the circuit court of Huron county. G. T. Stewart, for plaintiff. C. P. Wickham, for defendant.

5708. F. W. and C. A. Wastenev v. Leo Scott, Treas. Error to the circuit court of Hamilton county. Wilby & Wald, for plaintiff. Rendig, Foraker & Dinsmore, for defendant.

5709. The Henry St. Clair Co. et al v. John Eddins et al. Error to the circuit court of Preble county. Gottschall & Crawford, F. W. Limbert and J. W. King, for plaintiff. Jas. M. Gilmore, J. H., S. B. and C. C. Foos and E. P. Vaughan, for defendants.

5710. Solomon A. Burgunder et al., Partners, etc., v. Weil & Gugenheim et al. Error to the circuit court of Franklin county. Booth, Keating & Peters, for plaintiff. F. S. Monnett, Attorney General, Gumble & Gumble and Kramer & Kramer, for defendants.

5711. May Ollinger, a minor by, etc., v. William W. McGuffey et al. Error to the circuit court of Franklin county. F. G. Carpenter and C. E. Sims, for plaintiff. Arnold & Morton, for defendants.

5712. August J. Henkel v. The City of Cincinnati et al. Error to the circuit court of Hamilton county. Louis J. Doyle and Donaldson & Tussing for plaintiff.

5713. Henry Du Lawrence v. F. Gulker. Error to the circuit court of Cuyahoga county. Willson & David, for plaintiff. Kline, Carr, Tolles & Goff, for defendant.

5714. Alice S. Cotton, Ex'x, v. S. A. Ashley, Atty. Error to the circuit court of Ashtabula county. L. Newton Pettis and A. C. White, for plaintiff. Northway & Perry, for defendant.

5715. John S. Casement et al. surviving partner, etc. v. The Cincinnati & Eastern Ry. Co. Error to the circuit court of Clinton county. John J. Glidden and J. W. Bannon, for plaintiff. Hollister & Hollister and A. C. Thompson, for defendants.

5716. Michael Kerr v. The Ohio City & Olmstead Plank Road Co. et al. Error to the circuit court of Cuyahoga county. G. H. FASTER and Lawrence & Estep, f r plaintiff. W. W. Boynton and P. H. Kaiser, for defendants.

5717. Marco B. Garry, assignee v. M. F. Howe, agent of the T. & O. C. Ry. Co. Error to the circuit court of Hancock county. M. B. Gary and J. A. & E. V. Bope, for plaintiff. H. F. Burket for defendant.

5718. Alonzo McDowell et al. v. Melissa C. P. Rector. Error to the circuit court of Licking county. B. G. Smythe, for plaintiff. Carl Norpell, for defendant.

5719. The Pennsylvania Co. v. Vina Hammond, admx. Error to the circuit court of Mahoning county. P. R. Carey, for plaintiff. M. A. Norris, W. L. Anderson and James Kennedy, for defendant.

5720. in the matter of the application of Henry C. Fox for a Writ of Habeas Corpus. Habeas Corpus. Booth, Keating & Peters and James M. Butler, for plaintiff.

5721. Henry Pogue et al. v. Ruben B. Brooks, treas. et al. Error to the circuit court of Hamilton county. C. C. Cook, for plaintiff. Ellis G. Kinkead and Frank F. Dinsmore, for defendant.

5722. The C. H. & D. R. R. Co v. Lena Lear, admr. Error to the circuit court of Montgomery county. R. D. Marshall, for plaintiff. W. A. Halaman and John Roehm, for defendant.

5723. The L. S. & M. S. Ry. Co. v. The City of Elyria et al. Error to the circuit court of Lorain county. F. G. Jerome and E. G. Johnson, for plaintiff. Lee Stroup, for defendants.

5724. C. M. Kirk et al. ex'rs. v. Elizabeth McCullum, admx. Error to the circuit court of Mahoning county. Jones & Anderson, for plaintiff. C. D. Hine, for defendant.

5725. C. M. Kirk et al. ex'rs. v. George Hornmickel Error to the circuit court of Mahoning county. Jones & Anderson, for plaintiffs C. D. Hine, for defendant.

5726. Mary D. Nolan v. Michael Kaue Error to the circuit court of Hamilton county. K. P. Bradstreet for plaintiff. Thos. McDougal for defendant.

5727. The C. L. & W. Ry. Co. v. James M. Reid et al. Error to the circuit court of Lorain county. J. M. Kessick and E. G. Johnson, for plaintiff. Burke & Ingersoll, for defendant.

5728. The B. & O. R. R. Co. v. Charles W. Montgomery. Error to the circuit court of Licking county. J. H. Collins and Kibler & Kibler, for plaintiff. B. G. Smythe, for defendant.

5729. Philis H. Anschutz v. Jacob H. Foster et al. Error to the circuit court of Van Wert county. G. L. Marble, for plaintiff. H. C. Glenn and G. L. Marble, for defendant.

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mediate remedy for this condition rests in the disapproval of the executive. It is worthy of note that the governor of New York by withholding his approval put to death about 500 passed bills in the present year. In New Jersey, ninety were similarly disposed of, a smaller number, but in proportion to the number passed, an equal percentage. Yet I doubt if a single reasonable complaint of inconvenience or public loss has been heard by reason of the failure of these 590 bills to become laws.

This excessive legislative activity is a feature of our own times. It has developed enormously within a very few recent years. A comparison of the annual volumes of statutes of any particular state for the last twenty years will prove this.

Something of this increase is attributable to the great business development of the times, to the contributions of scientific discovery to the machinery of life.

The common law afforded no principal which by judicial extension could be made to regulate justly the business of telegraphy. City charters contained no provisions under which electric or cable roads would be operated through the streets. To our ancestors came not even a dream that one day the human voice could be heard across thousands of miles of distance.

They had laws to punish witchcraft but none to cover the larceny of telegraph messages by wire tappers, or the theft of light by illicit connection with an electric circuit. As invention and discovery have added new processes and devices to the tool shop of civilization, novel adjustments of the laws have been required to regulate the business of the world to the improved conditions.

At the same time there have been commendable movements to restrict the volume of legislation. By constitutional provisions in many States, the passage of special laws upon many subjects is forbidden, notably in the matters of granting charters of corporation and the government of cities, counties and other municipal divisions of the State.

Yet the masses of trivial legislation, of statutes uncalled for by any public inconvenience or necessity, go on increas-

ing, confusing the citizen, embarrassing the lawyer and perplexing the courts of justice with contradictions, inconsistencies, dilemmas and floods of verbal turpitude.

Laws enacted one year are repealed the next, to give place to some new conception. The spirit of conservatism dies out in the fierce unrest of this busy age. Of these multitudinous strivings for change for the mere sake of change, in our laws it may be said: "Age cannot wither them, nor custom stale their infinite variety."

The history of the English law reveals change and growth, but growth by slow and deliberate processes; not the quick growth that produces the soft wood of the moist and heated tropics, but the slow accretions by which we obtain the hardy fibre of the oak or the supple strength of the yew, a growth through years of storm and stress, roots deep sunk and sinking ever deeper into the soil, reaching out wider and wider, taking hold of rocks for greater firmness, tops rising ever higher above the undergrowth, with gnarls and knots indeed, but trunks that are sound at heart, and branches broad and green, and sheltering even in storm.

The contemplation of the history of the system of English law which we inherit is to the lawyer a cause of enthusiasm and a lesson in conservatism. To trace the growth of this system from the earliest beginnings from the proto-plasmic cells, so to speak, of village and tribal customs among the primeval fens and forests of Saxony, or the bogs and crags of Jutland, on through centuries of progressive evolution upon English soil and under English skies until we see its mature development in that system of unenacted law which we call the common law, is an employment well calculated to arouse the admiration and enthusiasm of the lawyer and statesman as well as of the mere student of history. Modern scholars like Sir Henry Maine, Prof. Austin, Dr. Stubbs and Prof. Maitland have done for the history of law what Darwin and his successors have done in the domain of biology. We know from discoveries in natural history how the horse, for instance, by process of evolution has developed from a shape no great

er than a fox, with ungulous feet, over vast periods of progression, into the pleohippus of one geological age, the mesohippus of another, and the eohippus of a third, with a gradually increasing size and modifications in form and adaptability until it has attained its perfection in the stately beauty of the barb and the fleetness and docility of the modern racer. Remains of the primeval progenitors of this genus brought to light by the hand of discovery in bone-caves and geological strata tell the story of its upward tendency through vast periods of geological history.

So have the records of the old Germanic tribes, of their semi-barbarous successors in the conquest of Britain—of Angles and Saxons and Danes and Franks and Normans, and finally of the composite English race—records unearthed from the bone-caves of early literature, and from the dust-covered deposits of doom books, statute rolls, court rolls, pipe rolls, patent rolls, assize rolls and original writs, revealed to us the evolution of common law from the earliest trivial forms in tribal or village custom through ever advancing and expanding stages of progressive development, with the force of selection and adaptability always at work, until we see it the revered code of life and government for a great enlightened Christian nation, a code so compact with the principles of justice and liberty that it may well evoke the enthusiastic exclamation, "esto perpetua!" with which its contemplation inspired the placid pen of Sir William Blackstone.

Not only have laws in the restricted sense as rules of conduct so grown and developed by slow and gradual steps through centuries of national existence, but institutions of government and the machinery of justice have had similar courses of evolutionary development. The courts of chancery and exchequer can be traced back to their beginnings as developments of procedure without warrant of legislative enactment.

The common law is usually conceived to be the collection of rules and customs adopted in actual life among the people of the realm. It would be more correct to regard much of it as the result of judicial procedure and decision. The com-

mon law has developed without the pomp of legislative enactment by the aid of what we know as "legislation by the courts." It is only necessary to study the history of judicial procedure to understand this. The celebrated work of Bracton, the first comprehensive treatise on English law, is arranged under three heads: (1) Persons, (2) Things, (3) Actions. The relative amount of space required for a statement of the law upon these three heads is represented by the figures 7: 91: 356. More than three times as many folios are required to set forth the law of procedure as are needed to state the rights of persons and property. But this is true only in a categorical sense. Prof. Maitland points out that Bracton's chapters on the law of actions contain the most important elements of substantive English law, while his treatise on rights partakes more of the nature of a work on speculative jurisprudence. The King's justices always disclaimed the power to make law; they asserted that their function was not to change but to improve—a disclaimer which, fortunately for our jurisprudence, must be disallowed.

In considering the extension and improvement of jurisprudence, we have, therefore, two forces to which we can look—one the power of direct legislation through constitutional representative assemblies, and the other the power of the courts by decision to extend old principles to new conditions. In the American Republic this latter power is extraordinarily great, because, by the arrangement of our system, the courts are vested with the final decision as to what is law and what is not law, and stands in a sense above the Legislature, vested with the right of declaring void and setting aside the statutes passed by the Legislature for any violation of constitutional restriction. In all matters, therefore, of constitutional construction and in the extension of constitutional principles by decision, the courts are for the time being supreme. Nor has the process of judicial legislation ceased upon matters other than constitutional. It is still in operation in every court of appellate jurisdiction. We need not lament the fact. The courts, are apt to make better laws than the legislatures, not, of course, upon those

departments of legislation that are administrative or governmental, but upon those subjects of general jurisprudence that form the great body of our substantive law of life, conduct, business and trade. Judge-made law is apt to be better because it is not violent nor revolutionary, because it is the result of the keenest and best trained thought striving for consistency, uniformity and stability, and is inspired by the principles of justice. The most carefully framed statute is apt to produce confusion, doubt and uncertainty, to the solving of which numerous appeals to judicial interpretation are necessary. One need only look at the cases that have arisen under the Statute of Limitations and the Statute of Frauds to appreciate how difficult it is to draw a comprehensive act which shall be clear in expression and free from doubt in its application.

I have said enough of the prolific tendency to legislate that prevails in our day. It remains to speak of such remedies as can be applied.

It is useless to discuss fundamental changes in the constitution of parliamentary bodies. With all its defects our representative system is the best the brain of man ever devised or his experience worked out.

A lower house with membership frequently changing secures closeness of touch and sympathy with the people. The upper house secures the calmness and deliberation which are essential to guard against sudden and unreasoning popular prejudices, to give stability to our system of law, and in seasons of clamor and unrest to save the people from the folly of their own excitement and emotions.

If representative bodies like our State Legislatures are unable to deal with entire success with all the complicated and subtle questions that are presented for their consideration, how much less can it be expected that the masses of the people would be able to do so? Yet we find some who seriously propose to regulate legislation to the body of the people, and by means of the system known as the referendum take the popular voice, not through the people's chosen representatives, but from the direct votes of the people themselves. This is to abandon

the system of representative government. Government by representation is a principal derived from the oldest custom of the Anglo-Saxon race. In Huchbald's biography of S. Lebuin, a book written in the tenth century, is found this remarkable passage concerning the Saxons of the eighth century:

"Once every year at a fixed season, of each local division and out of the three orders severally, twelve men were elected who, having assembled together in Mid-Saxony near the Weser, at a place called Marko, held a common council, deliberating, enacting and publishing measures of common interest, according to the tenor of a law adopted by themselves."

Historians of the English constitution trace the existence of such a representative assembly through all the periods of national existence. Whether the nation be Northumbrian, or Mercian, or East Saxon, or West Saxon, or all united in one English people, there is always the assembly, the council, the witenagemot, the parliament. And this is never a gathering of all the inhabitants, but a meeting of delegates, of men chosen, elected, on account of their prominence or wisdom or influence, to act for their respective constituencies. The witenagemot was what the word signifies—a meeting of the wise men. The system is one of representation, not of pure democracy. Our ancestors were sensible enough to know that the knowledge and temper and deliberation necessary to law-making were not to be found in the assembly of all the citizens. Upon this idea the government of England and her colonies is based. The Federal Government of these United States and the government of all the States of the Union are based upon the same principle. To depart from it is impossible. To indulge in the practice of the referendum; except upon such matters as constitutional amendments, would tend to destroy confidences in our republican system and produce the highest degree of instability, subjecting the judgment of the uninformed and the passionate for that of the selected and responsible representatives. The operation of this practice is seen in the submission of constitutional amendments to the vote of the people. Very rarely, indeed, can wide popular interest be

aroused over such an election; the vote is always light; and the discussion usually is confined to prefatory newspaper editorials, and to those who take unusual interest in public affairs. The masses of the people are very willing to exercise the right of suffrage in the choice of representatives, but in the making of laws and constitutions they are mostly content to confide in the wisdom and work of others. The most pertinent argument against the proposition to establish the system of legislation by the "initiative and referendum" is found in the fact that the people do not desire to make their own laws. They want them made by their representatives.

We do not want the system changed; it is only necessary that our legislative bodies shall be controlled, restrained and regulated by a proper sense of the solemnity and responsibility that pertain to the power they exercise; that they shall learn to respect the wisdom of conservatism, to value stability more than experiment.

The extension of the practice of holding only biennial sessions of state legislatures—a practice prevalent now in more than thirty states—will do much to decrease the amount of legislation. It is to be hoped that the system may be extended to other states.

There is room for improvement also in the quality of the men selected as members of the state legislatures. Too much regard is paid to political qualifications and not enough legislative ability. This is not the fault of the citizens; very often they get the best obtainable. There is a great failure on the part of men who are specially qualified by education and attainments to do their whole duty to the state by serving in the legislative bodies of the state and the city. I have observed that the people prefer to choose high-class public agents when they can get them. But the scholars and lawyers best qualified to guide and restrain legislation very rarely are willing to give their time to public service in the legislature. On rare occasions they will come forth and serve the state with great zeal and benefit; but usually they confine their activity to criticising what less competent men have done. We need a larger contribution of the

time and brains of our abler business men and lawyers, both in state legislature and the common councils of cities. Their expert knowledge and conservative habits will strike the enacting clause out of many a useless bill that otherwise would drift through on the tide that is more easy to float with than to stem. We need more legislators with moral and legal backbone to stand up against all oppositions that lack positive utility.

Public discussion, disclosing the harm that is resulting and must result from excessive and useless legislation, will be useful by awakening public sentiment and extending its influence to the membership of the legislatures.

In this work the bar, always foremost in all that pertains to good government, can render most valuable service. They perhaps more than any other class are charged with responsibility in this matter, for it pertains directly to their own especial province. It was with the hope that I might secure the attention of the bar of America to the reform of this evil—a reform which I have in my official capacity tried to effect in the legislation of my own state—that I have chosen this subject for your consideration.

In a large degree the faulty construction of our statutes is due to the legal profession, for there is no doubt that they are mostly framed by lawyers. But they are prepared in most instances by attorneys specially employed for particular objects, which being accomplished, little regard is paid to their relation to kindred laws or to their effect upon the general body of jurisprudence. The author of one bill proceeds to make a modification of the law which will effect his client's purpose, and takes no note of any others that may be striving for the amendment of the same law in other respects. So that there is no concert of purpose, no consideration, no consistency in style or in the use of legal expressions. There is indeed a higher sense of responsibility among lawyers who engage in the drafting of bills at private solicitation; and there ought to be a more censorious attitude among legislators toward propositions for legislation that emanate from private sources.

I do not wish to enter the controversy which divides the partisans of codifica-

tions and its opponents. It is a fairly debatable question whether it is better to have the body of the law comprised within a written code or existing in the indefinite mass of the common law modified by miscellaneous and occasional statutory amendments. If our command of legal expression were sufficiently complete and precise, our knowledge exhaustive, and our knack of classification equal to that of the scientist, we might safely venture upon the reduction to written statutes of many subjects of general law. But, as has been shrewdly said by Sir Henry Maine, until we can produce a perfect statute, it is idle to expect a complete code. Half of the terror that would be inspired by the rude activity of the legislative propensity of the day is taken away by the reflection that there are few statutes of novel application which will stand the test of judicial criticism.

In this land of written constitutions the bar are especially trained in the application of constitutional tests to acts of congress and statutes of the states. Constitutional and statutory construction engages much of the attention of our courts, and we have developed a fine ability to analyze, compare and apply, as well as to annul, the work of our legislators. It is remarkable that, with this experience and skill in the interpretation of statutes, we have not developed a corresponding proficiency in drafting acts of legislation.

Whatever we may do with reference to codification of general acts, we find it necessary very frequently to codify our statutes. The great number of supplements and amendments that are passed from year to year so obscure the original text that a revision or some similar reduction toward order and simplicity is necessary every few years. In New Jersey, since 1875, there have been four authorized publications of the general laws, under the various titles of "Revision," "Revised Statutes," "Supplement to the Revised Statutes, and "General Statutes." In that period the mass of general statutes has grown from one volume of about 900 pages to the three large octavos containing over 3 000 pages.

At the present time so great is the dissatisfaction of the bench and bar that

special commissions of eminent lawyers have been appointed by the executive under legislative sanction to revise and codify anew the most important titles, with a view of reducing and clarifying the confused mass of enactments that have been piled upon the original text. This service is rendered without compensation out of a sense of public duty, a fact worthy to be recorded to the credit of the bar of New Jersey. This will serve the double purpose of improving present conditions and warning against further excess. It distinctly recognizes the fact that the help of skilled men working on lines of public and not of private interest must be called in to aid the legislature when accurate and skillful revision is wanted.

If that practice can be extended so as to have every bill receive the careful revision of a trained draftsman, the gain in simplicity, stability and diminution of litigation will be enormous.

It is not to be expected that the high degree of knowledge, skill and care necessary to the revision or codification of any title of the general statutes, can be always obtained among the members of a legislature, busy as they generally are with matters of more or less political importance. Such work should be prepared with the thorough-going care and pains that pertain to the library and the study rather than amid the turmoil and excitement of a legislative session. It should be ready in advance of the assembling of the legislature, and carefully compared, revised and considered by several hands. Only a special commission can do this. It is to be noted that congress has provided for such a commission to revise the criminal and penal statutes of the United States.

A censor of bills is not permissible under our system of legislation, but there can be a rule of public opinion, a sentiment of prudence and conservatism that will enable every legislator to reject all measures not properly revised and corrected, all measures that have no positive public necessity to justify their adoption. It ought not to be enough that a proposed law does no harm: it should be required of it that it shall have the quality of positive benefit in order to justify its enactment.

There are some principles of legislative policy that are so plain and safe that they need only to be stated to be approved.

Make sure that the old law is really deficient. Be careful to consider whether the inconvenience arising from the deficiency of the old law is of enough importance to deserve an act of the legislature to cure it.

Be careful that the remedy be not worse than the disease. Avoid experiments in law-making, especially if recommended by men or parties who are void of knowledge or wanting in respect for established customs.

Do not go on the idea that the world is out of joint, and you were born to set it right.

Observe accuracy in the use of language, and avoid the use of ambiguous expressions.

It is one of the just criticisms of our jurisprudence that it has not a technical vocabulary by which legal conceptions can be expressed with as much accuracy as naturalists distinguish genera and species.

This is not a topic that will enlist the enthusiasm of political conventions, or awaken the energies of popular masses. It lacks the elements that attract those who are fond of exciting and spectacular issues. It belongs to that class of public service that requires infinite pains and infinite patience. It is a contest against an easy-going tendency, not an appeal for some soul-stirring principle of liberty. This reform cannot be demanded at the point of the sword as the barons at Runnymede compelled the granting of the great charter. There is no Independence Hall, no Liberty Bell, no Emancipation Proclamation, no loyal sentiment to rally the people. And yet, as Madison said, an irregular and mutable legislation is not more an evil in itself than it is odious to the people.

A realization of this fact will give us legislators more careful to guard against frequent and unnecessary changes. I would I could impress upon the members of the American bar a deeper sense of the duty they owe to their states in the assumption of political service. There is no higher satisfaction in life than the consciousness of having done one's duty

even though it be in obscure and unnoted service. Such a field is open and the need is urgent. I would not desire to advise any to disregard the ordinary honorable methods of political work through party organizations. The political parties comprise the great mass of the people and through them the best results can be accomplished. The purely academic citizen never does much but criticize. He does not go down among the masses of the people to learn their habits and thoughts and how they must be managed and taught and led into ways of political sense and wisdom. Yet a system of law, in order to be most beneficent, must accord with popular common sense. The Athenians intrusted Solon with the sole and absolute power of revising the constitution and laws of Athens, yet he confessed that he had not given to them the laws best suited to their happiness; but those most tolerable to their prejudices. Perhaps that is why Solon is known as a very wise man.

This subject is not new to the members of this association; it has been discussed with great ability at former annual meetings. But the quantity of slipshod and unnecessary legislation has gone on increasing. It may be that this evil is like some diseases—it must get worse before it can get better. Surely, the disease of excessive law-making has reached a degree of intensity sufficiently bad to justify an expectation of reaction. The disapproval of more than five hundred passed bills by the Governor of one State and of ninety by another in the present year has served to call general attention to the subject in a very marked manner. The creation and maintenance of a strong public sentiment in favor of greater care and conservation in legislation will tend more powerfully than any other element to check the evil. But that sentiment must be perpetual. More things than liberty are preserved only at the price of eternal vigilance. It is time that universal war should be made by the bench, the bar and all orders of intelligence upon the notion that every misfortune, every inconvenience can be cured by a law. The rules of business, the laws of trade, the operations, of natural laws and processes, the qualities of human nature, the recurrence of

the seasons, misfortune, sickness, death, the Ten Commandments—all these and many others are beyond the proper realm of legislative dabbling; yet many people seem to think that a simple act of Congress or of a State Legislature can change them all.

Let us continue our labors for uniformity of law upon proper topics, for simplicity of procedure, for better legal education, for international arbitration; and at the same time let us strive to increase the spirit of careful conservatism which is the best preservative of good, to cry a continual alarm against trifling with the deep-laid foundations of our jurisprudence, and to preserve for our laws that sentiment of reverence and respect which hitherto have so distinguished the Anglo-Saxon race.

#### SUPREME COURT PROCEEDINGS.

Causes to and including No. 4889, on the general docket, are called and marked submitted. The next call will be to and including No. 5006.

#### General Docket.

TUESDAY, October 6, 1897.

4668. The Board of Education of the Findlay Schools v. William Stephenson. Error to the circuit court of Hancock county. Judgment affirmed.

4672. Edward T. Mithoff v. John R. Hughes et al. Error to the circuit court of Franklin county. Judgment affirmed. Minshall, J., dissents.

4697. William M. Greene et al. v. David Greene et al. Error to the circuit court of Franklin county. Judgment affirmed on authority of Johnson v. Johnson, 51 Ohio St., 446.

4716. Smith Grimes et al. v. Mary J. Crawford et al. Error to the circuit court of Adams county. Judgment affirmed.

4721. Elizabeth Chester v. Michael D. Floyd et al. Error to the circuit court of Guernsey county. Judgment affirmed upon the grounds stated in the journal entry.

4722. Carry C. Harris v. The Ohio Oil Company. Error to the circuit court of Wood county. Judgment affirmed.

4750. Henry Bodi et al. v. The Winous Point Shooting Club. Error to the circuit court of Ottawa county. Judgment to the circuit court enjoining fishing reversed and remainder of judgment affirmed. Each party to pay one-half of costs in this court. See journal entry.

4884. Elmina Kutz v. The Genessee Oil Co. et al. Error to the circuit court of Hancock

county. Dismissed by consent of parties at costs of plaintiff in error.

4885. David K. Moore et al. v. Clara Thompson. Error to the circuit court of Columbiana county. Dismissed by consent of parties at costs of defendant in error.

5312. George Hartman et al. Commissioners v. Caroline Sawyer. Error to the circuit court of Erie county. Judgment affirmed for the reason that the cause of reversal was that the verdict was not sustained by sufficient evidence. Other questions not passed upon.

5700. State of Ohio ex rel. George W. Franklin v. Charles Kinney, as State Supervisor of Elections. Mandamus. Demurrer to petition sustained, and petition dismissed at costs of relator.

5720. In the matter of Application of Henry C. Fox for a writ of *habeas corpus*. This court refuses to entertain this cause, and the petition is dismissed without prejudice at the costs of the petitioner.

The following causes on the general docket have been dismissed for want of preparation:

4774. Alva E. Rambo v. The Incorporated Village of Newcomerstown et al. Error to the circuit court of Tuscarawas county.

4777. The Butchers' & Drovers' Building & Savings Co. v. James O. Woodard. Error to the circuit court of Hamilton county.

4780. Sarah E. Clason et al. v. Marv A. Ward et al. Error to the circuit court of Hamilton county.

4789. Louisa Beckman v. H. M. Fisk. Error to the circuit court of Cuyahoga county.

4799. L. D. Langmade et al. v. George L. Dorney et al. Error to the circuit court of Hancock county.

4806. Peter Speildenner v. Lena Gulbert, admx., etc. Error to the circuit court of Sandusky county.

4808. George W. Van Ceiver et al. v. John R. McLaughlin et al. Error to the circuit court of Franklin county.

4838. Louis Schenerer v. Joseph V. Irwin. Error to the circuit court of Hamilton county.

4840. William A. Wilson et al. v. The State of Ohio. Error to the circuit court of Tuscarawas county.

4859. George A. Peters v. William Hoy, constable, etc. Error to the circuit court of Delaware county.

4860. The J. J. Snider Lumber Co. v. William Cheek. Error to the circuit court of Franklin county.

4868. Arthur M. Jordon v. Blanchard J. Miller. Error to the circuit court of Putnam county.

4870. The Lufkin Rule Co. v. Xavier Pringeli et al. Error to the circuit court of Cuyahoga county.

The following causes on the general docket have been dismissed for failure to file printed record:

5540. *The Board of County Commissioners of Brown County v. Charles Gore.* Error to the circuit court of Brown county.

5543. *James M. Wentworth v. The L. S. & M. S. Ry. Co.* Error to the circuit court of Erie county.

5549. *Henry Rudesill v. Abraham Keel, Ex'r.* Error to the Circuit Court of Hancock county.

5571. *Struthers, Wells & Co., v. The Buckeye Supply Co. et al.* Error to the Circuit Court of Mercer county.

5594. *Oscar W. Kneisley v. Oscar F. Davidson, Trustee.* Error to the Circuit Court of Montgomery county.

5615. *Robert E. Bowen v. The Massachusetts Benefit Association et al.* Error to the Circuit Court of Cuyahoga county.

5648. *The Wabash R. R. Co. v. Terry E. Heeter.* Error to the Circuit Court of Lucas county.

#### Motion Docket.

2969. *The Lake Erie Ice Co. v. Frederick Schmidt.* Motion by defendant to advance cause No. 5537, on the General Docket. Motion allowed, cause advanced and briefs to be filed within rule.

2970. *The State of Ohio v. Louis F. Post.* Motion by the defendant to dismiss cause No. 5579, on the General Docket. Motion allowed and cause dismissed.

2971. *Gertrude Hesse, Admx. v. The C. H. & S. R. R. Co.* Motion by plaintiff to dispense with printing record in cause No. 5632, on the General Docket. Motion allowed.

2972. *Edward Snyder et al. Ex'rs. v. Henry D. Snyder.* Motion by plaintiffs to dispense with printing parts of record in cause No. 5672, on the General Docket. Motion withdrawn.

2973. *Selah Daniels, Admx. v. Henry P. Sanford, Receiver.* Motion by plaintiff to reinstate cause No. 5523, on the General Docket. Motion overruled.

2974. *The Merchants Banking & Storage Co. v. George Zipperle.* Motion by defendant to advance cause No. 5567, on the General Docket. Motion allowed, cause advanced and briefs to be filed with rule.

2975. *Lucian Lindsay, Admr. v. The Ohio Pipe Company.* Motion by plaintiff to dispense with printing record in cause No. 5671 on the general docket. Motion allowed.

2976. *The Elyria Gas & Water Co. v. a taxpayer on behalf etc. v. The City of Elyria et al.* Motion by defendants to advance cause No. 5673, on the general docket. Motion allowed, cause advanced and briefs of plaintiff in error to be filed in 6 days and those of defendants in error in 10 days thereafter.

2977. *R. S. Hubbard as Treas., etc. v. Thomas G. Fitzsimmons.* Motion by plaintiff to advance and for oral argument in cause No. 5544, on the general docket. Motion allowed, cause advanced and briefs to be filed within rule. Oral argument noted.

2978. *August H. Arend et al. v. C. N. Biehs et al.* Motion by defendants to set aside service of summons in cause No. 4921, on the general docket. Motion allowed.

2979. *The Northwestern Ohio Natural Gas Co. v. Annie Davis et al.* Motion by plaintiff for leave to file supplemental petition in error cause No. 4782, on the general docket. Motion overruled.

2980. *The Northwestern Ohio Natural Gas Co. v. Annie Davies et al.* Motion by defendants to dismiss, etc. in cause No. 4821, on the general docket. Motion overruled.

2981. *George Hartman et al v. Caroline Sawyer.* Motion by defendant for order affirming judgment of circuit court in cause No. 5312, on the general docket. Motion allowed.

3983. *Edson France v. The State of Ohio.* Motion for leave to file a petition in error to the court of common pleas of Sandusky county. Motion allowed, cause set for oral argument October 8, 1897.

2984. *The L. S. & M. S. Ry. Co. v. The City of Elyria et al.* Motion by defendant to advance cause No. 4723, on the general docket. Motion allowed, cause advanced, and briefs to be filed within rule.

2985. *James M. Wentworth v. The L. S. & M. S. Ry. Co.* Motion by plaintiff to reinstate cause No. 5543, on the general docket. Motion overruled.

2986. *May Olinger, a minor by etc. v. Wm. W. McGuffey et al.* Motion by defendants to dismiss cause No. 5711, on the general docket. Motion allowed and cause dismissed.

2989. *The Commercial Bank of Morris, Sharp & Co. v. George W. Patton as treasurer of Fayette county, Ohio.* Motion by defendant to advance cause No. 5651, on the general docket. Passed for notice.

2988. *The B & O R. R. Co. v. John Robinson.* Motion by defendant to advance cause No. 5684, on the general docket. Motion allowed, cause advanced and briefs to be filed within rule.

2969. *The state of Ohio ex rel. John F. Wilson v. Charles Kinney, state supervisor of elections of Ohio.* Motion by relator for writ of mandamus in cause No. 5731, on the general docket. Motion allowed.

2990. *John J. Walsh v. The C. H. V. & A. R. R. Co.* Motion by defendant to advance cause No. 5622, on the general docket. Oral argument requested. Motion allowed, cause advanced and briefs to be filed within rule. Oral argument requested.

2991. *Robert Wright v. The C. H. V. & A. R. R. Co.* Motion by defendant to advance cause No. 5623, on the general docket. Oral argument requested. Motion allowed, cause advanced and briefs to be filed within rule. Oral argument requested.

2992. *Michael L. Voight v. The C. H. V. & A. R. R. Co.* Motion by defendant to advance cause No. 5624, on the general docket. Oral argument requested. Motion allowed, cause advanced and briefs to be filed within rule. Oral argument requested.

2993. Thomas Shotwell v. The C. H. V. & A. R. R. Co. Motion by defendant to advance cause No. 5625, on the general docket. Oral argument requested. Motion allowed, cause advanced and briefs to be filed within rule. Oral argument requested.

#### New Cases.

New cases in the supreme court since September 23, 1897.

5730. I. F. Randabaugh v. Charles F. Hart. Error to the circuit court of Mercer county. Selqyn N. Owen and Marsh & Loree, for plaintiff. Motter & McKinzie and Goeke & Culliton, for defendant.

5731. The State of Ohio ex rel. John F. Wilson v. Charles Kinney. State Supervisor of Elections. In mandamus. S. J. Hatfield, Andrew J. Hess, John F. Wilson and J. E. Russell, for plaintiff. Daniel J. Ryan, for defendant.

5732. Frederick B. Lotze et al. Ex'rs. v. The City of Cincinnati. Error to the superior court of Cincinnati. Drausin & Wilson, for plaintiffs. Ellis G. Kinkead, for defendant.

5733. William F. McCullough et al. v. Martha A. Marshall et al., Admx. Error to the circuit court of Shelby county.

5734. The B. & O. R. R. Co. v. George Kraeger et al. Error to the circuit court of Muskingum county. J. H. Collins and F. A. Durban, for plaintiff. Ball, Swingle & Marshall, for defendants.

5735. The B. & O. R. R. Co. v. The Diamond Coal Co. Error to the circuit court of Muskingum county. J. H. Collins and F. A. Durban, for plaintiff. F. H. Southard, for defendant.

5736. Leroy E. Clark v. The Board of County Commissioners of Lucas county. Error to the circuit court of Lucas county. Clayton W. Everett, for plaintiff. Orien W. Wilson, for defendant.

5737. R. S. Hubbard, Treas. of Cuyahoga county v. Charles E. Brush. Error to the circuit court of Cuyahoga county. P. H. Kaiser, for plaintiff. Williamson, Cushing & Clark, for defendant.

5738. Collin Nandenbart v. Thomas Matthingley et al. Error to the circuit court of Muskingum county. C. M. Vandembark, for plaintiff. W. H. Ball & Durban & McDermott, for defendant.

5739. The Norwalk Savings Bank Co. v. The Norwalk Metal Spinning & Stamping Co. Error to the circuit court of Huron county. Stewart & Rowley and Bentley & Stewart, for plaintiff. C. M. Stewart, A. M. Beattie and G. T. Stewart, for defendant.

5740. Alvah Shobe v. Americus Miesse et al. Error to the circuit court of Allen county. Walter B. Richie and D. C. Henderson, for plaintiff. Prophet & Eastman, for defendants.

5741. George W. Shaw v. George L. Foley, Assignee. Error to the circuit court of Muskingum county. F. S. Gates and H. F. Achauer, for plaintiff. C. M. Vandembark, Ball &

Swingle, Perry Smith and Durban & McDermott, for defendant.

5742. A. J. Kennedy v. A. J. Penney. Error to the circuit court of Brown county. H. H. Whitman, for plaintiff. Thompson & Fite, for defendant.

5743. C. D. Mason, Assignee v. Schleicher, Schumn & Co. Error to the circuit court of Ashland county. George A. Nicol, for plaintiff. Campbell & Sempie, for defendant.

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